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CIS

OVERSIGHT OF THE ACTIVITIES OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE DEPARTMENT OF LABOR

HEARINGS

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

OVERSIGHT ON ACTIVITIES OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, FOCUSING ON EXECUTIVE ORDER 11246, REGULATIONS RELATING TO AFFIRMATIVE ACTION

JULY 29, 30, AND OCTOBER 22, 1981

Part 1

Printed for the use of the Committee on Labor and Human Resources

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OVERSIGHT ON THE ACTIVITIES OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE DEPARTMENT OF LABOR, 1981

WEDNESDAY, JULY 29, 1981

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C.

The committee met, pursuant to notice, at 9 a.m., in room 4232, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the committee) presiding.

Present: Senators Hatch, Nickles, Hawkins, and Quayle.

Staff present: John Florez, Rick Lawson, Robin Rushton, and Diane Howland, professional staff members.

OPENING STATEMENT OF SENATOR HATCH

The CHAIRMAN. Today this committee begins a series of oversight hearings on Executive Order 11246, the so-called affirmative action Executive order.

These hearings' purpose really is to examine how effectively the Office of Federal Contracts Compliance Programs—the Office responsible for fulfilling the intent of Executive Order 11246—is carrying out that charge and to propose solutions as needed.

I emphasize "intent" because there is an inherent tendency for any organization, if not scrutinized and revitalized periodically, to lose sight of its reason for existence.

Fortunately, our system of government does provide the means to revitalize our Government institutions and to report to our citizens the level of stewardship carried out by our public officials, and that amounts to congressional oversight.

The Office of Federal Contract Compliance Programs has been one of those agencies which has not been reviewed from the many different perspectives necessary. As a consequence it has lost sight of the problems for which it was created to solve: the elimination of discriminatory barriers and to increase the number of opportunities to minorities and women in the Federal contracts workplace.

For example, OFCCP's leadership during the past administration measured its success by the amount of backpay it was able to obtain rather than by increasing employment opportunities.

There are many reasons for this Office going astray, not the least of which has been Congress unwillingness to ask the difficult, critical, and unpopular questions, partly, I suppose, for fear of being labeled racist or sexist.

If our institutions are to maintain their vitality as problem-solving entities, we must exercise candor and ask the hard but necessary questions vital to the renewal of the institution's commitment to its intended mission. We must be critics, but loving critics.

This committee will carry out its oversight responsibilities with vigor, persistence, candor, and—most important—with fairness. This is critical as we review an agency which has been charged with the awesome and most important responsibility of eliminating discriminatory barriers in the Federal contracting workplace. This committee is committed to that goal and will do everything within its power to fulfill it.

To demonstrate that commitment we will do something which is seldom done by congressional committees. Over the coming year we will launch a systematic review of OFCCP through a series of hearings and audits with the ultimate goal of improving OFCCP's capacity to carry out its intended mission. This review will consist of three sets of oversight hearings and a review of OFCCP's activities and progress every 6 months thereafter.

This first set starting today will review the effects of OFCCP's current regulations upon Federal contractors, women, and minorities. The second series will examine indepth the most controversial and critical issues of the regulations—backpay, jurisdictional extent and overlap, availability, goals and timetables, intent versus effect tests, and due process issues. The third set of hearings—and the most important—will deal with solutions.

Too often we spend more time looking at problems rather than solving them. We intend to come up with answers which will help fulfill the initial intent of the Executive Order 11246 or change that order.

If we dare be open to new ideas and not wedded to old ways simply because "that's the way we've always done it," we may be surprised to find new and creative ways to eliminate discrimination in our country.

The Reagan administration, unlike previous ones, has begun to speak out against heavy reliance on strict numerical requirements in employment.

In a recent speech Attorney General William French Smith said that while the administration was firmly committed to the principle of liability for intentional discrimination, "The Nation must end its overreliance on various remedial devices aimed solely at achieving inflexible and predetermined mathematical balance." He called on all of us to "engage in practical problem-solving and adopt measures that will realistically remedy the direct results of discrimination."

I personally applaud Mr. Smith and hope his message quickly filters down to the Department of Labor.

Because practical problem-solving does not appear to have been the hallmark of OFCCP's administration of the Executive order, our purpose in conducting these hearings is to heed the Attorney General's call. We hear criticisms that the agency regularly requests from contractors reams of employment data that are unnecessary, that it has no policies to encourage voluntary compliance, and that its compliance officers routinely threaten total debarment if their requirements are not followed to the letter.

Today we start what I hope will be a major effort on this committee's part to work toward eradicating discrimination in America, an effort which will call upon the finest qualities of the American people—its sense of fairness and kindness rather than hostility and preferential treatment—an effort which will call upon the leadership of women, minorities, and the business community in solving what continues to be a major problem of this country.

For too long we have looked only to stronger Federal regulations to solve a problem that affects each of us and thereby absolve ourselves from further responsibility for doing any more.

The problem belongs to all of us and to each of us. So we must each do our part in working together to end discrimination in America. This committee will do its part in working toward that goal, and I trust America will do its.

I am pleased to see the large number of groups and individual employers interested in coming forth to testify, since it demonstrates the high level of interest in discussing and improving the status quo. I am especially pleased to see both big and small businesses come forth to testify since other hearings have not benefited from their viewpoints.

I am told some have been reluctant to express themselves for fear of retaliation by regulatory and compliance agencies. I abhor such tactics, and this committee will do everything within its power to correct any such administrative abuses, and I can guarantee we will come down hard on them. We may do away with some agencies if that is the way things have to stand.

While we have made every effort to have testimony from as many as possible, unfortunately we cannot hear everyone. We will, however, be accepting written testimony for 10 days after this hearing and will invite anyone interested to provide that.

If any want to submit their testimony, we will be happy to receive it; and we intend to make most if not all of it a part of the record we are making in this matter.

It is no secret that we have been conducting extensive and important hearings in the Judiciary Committee's Subcommittee on the Constitution. Those hearings have been conducted with regard to our constitutional equal protection amendment.

On the other hand, these hearings will have a little different thrust from those. There we are trying to generally discuss the question of affirmative action and hope that we can come up with some constitutional solutions; but here we are talking about practical, everyday problems created by many facets surrounding the problem of affirmative action. I hope we can do an awful lot by holding these hearings.

Senator Nickles?

OPENING STATEMENT OF SENATOR NICKLES

Senator **Nickles**. Thank you, Mr. Chairman.

I would like to first thank the chairman for holding these extensive hearings on the important topic of affirmative action and for focusing on the oversight of the agency responsible for implementing Executive Order 11246—the Office of Federal Contract Compliance Programs.

On September 24, 1965, President Johnson signed Executive Order 11246. This order, as revised by President Johnson and later by President Carter, granted the authority for the establishment of OFCCP.

The original intent was to insure that certain contractors and subcontractors with contracts or subcontracts with the Federal Government did not discriminate on the basis of race, color, religion, sex, or national origin.

I do not question the good intentions of this legislation, but I do question the results.

Over the last several years this agency has increasingly overstepped its jurisdictional boundaries, imposed regulatory requirements which are unrealistic, burdensome, costly, and a drain on the national economy.

These regulations often conflict with those under title VII of the Civil Rights Act so that a Federal contractor can fully comply with title VII and yet be in violation of OFCCP.

For example, the Supreme Court has upheld bona fide seniority systems under title VII even if their neutrality perpetuates the effects of past discrimination. OFCCP contends, however, that the legality of these seniority systems under title VII does not guarantee that it is legal for OFCCP purposes. This is an absurd result.

There are other areas where overlapping and conflicting regulations under title VII and Executive Order 11246 cause severe problems and confusion for contractors and subcontractors who want to do business with the Federal Government.

Not only do business people get caught in this double bind, but also taxpayers must pay for this needless duplication as well as the consumers. I hope this committee will utilize this opportunity to address this duplication and to develop solutions.

The Office of Federal Contract Compliance Programs has a broad reach. Its dictates apply to every utility that provides heat or light to Government buildings, every college that does Government research, every bank that holds a Government deposit, and to hundreds of companies coast to coast that sell products to the Federal Government.

The OFCCP has a budget of $51 million and employs almost 1,500 people to monitor the approximately 325,000 facilities or plants with Federal contracts. Since most are multifacility industries, OFCCP is actually responsible for monitoring 107,000 workplaces employing 26.2 million individuals.

It is estimated that 16,500 Federal contractors who must maintain affirmative action programs for OFCCP spend over $1 billion each year in compliance. These costs are obviously passed on to the taxpayers and consumers.

These costly affirmative action programs must contain, among other things, goals and timetables if it is determined that minorities or women are underutilized for any job group. This underutilization is said to result if the number of minorities or women in each and every job category within a work force is not the same as the availability in the surrounding geographical labor market.

This means, for example, if there are 6 percent women determined available in the local construction labor market a construction contractor with 55 employees must have 3.3 women. If such a contractor has employed three women he or she is in violation of OFCCP, whether a qualified woman can be found to fill the job or not.

These goals and timetables were never intended to be synonymous with quotas. However, this is the way they have been utilized. As a result, instead of encouraging strong affirmative action programs the OFCCP has been a punitive enforcement mechanism.

In those instances where past economic, geographic, or social conditions have deprived some individuals of employment opportunities employers should take affirmative action alternatives to recruit, employ, train, and promote qualified members of protected classes, including handicapped persons, and veterans, rather than imposing any form of a mandatory quota system.

Such outreach efforts might include special recruitment programs, training programs, and provisional employment; but at no time should qualified applicants or employees be denied employment or promotion opportunities solely because they are not members of a protected class.

As I stated earlier, I applaud efforts to end discrimination. We need, however, to bring an end to this new reverse discrimination which is being promoted by our Federal agencies.

Mr. Chairman, in yesterday's Wall Street Journal, Thomas Sowell had an article entitled "Affirmative Action—Harm to the Disadvantaged." I wish to place this article into the record for our colleagues to study because I think it well illustrates how affirmative action programs have actually discriminated against those they were actually designed to help.

The CHAIRMAN. Without objection, it will be inserted at this point.

[The article referred to follows:]

THE WALL STREET JOURNAL, TUESDAY, JULY 28, 1981

Affirmative Action Harms the Disadvantaged

By THOMAS SOWELL

The supreme irony of "affirmative action" is that it demands hard statistical results from others but has none to offer itself. This is the tenth year of numerical "goals and timetables" in employment—quotas, for those who prefer plain English. Yet the actual results of a decade of this controversial program are seldom mentioned.

Before "goals and timetables" were mandated by federal guidelines in 1971, Puerto Rican family income was 60% of the national average. Today it is 50%. Black family income, as a percentage of white family income, has never in the past decade exceeded the level reached in 1969. Usually, it has been lower.

No doubt there are many factors behind these numbers. But imagine an employer with similar statistical trends trying to explain to EEOC or the courts that it was all due to other circumstances beyond his control. Yet that is what affirmative action proponents are reduced to. The results simply are not there to justify this bitterly divisive program.

Progress has not stopped completely for disadvantaged racial and ethnic groups. But the rate of progress is not as rapid as it was in the equal opportunity phase of the 1960s that preceded affirmative action quotas in the 1970s. Indeed, some proponents of affirmative action cite the slowing down of progress as a reason that this program is needed more than ever.

There are economic as well as statistical reasons for considering affirmative action counterproductive. The incentives created by quota pressures seem to increase the demand for "representatives" of the various groups designated by the government for special consideration. But at the very same time, these pressures make it more dangerous to have such people on the payroll.

Their future pay promotion, and discharge patterns can easily land the employer in costly legal proceedings, even if he ends up completely vindicated. But the plight of employers is not the central issue. The real problem is that disadvantaged groups can be damaged by the way employers seek to protect themselves.

One way out of the employer's dilemma is to hire minority applicants who are sufficiently above average that their future pay, promotions and discharge patterns are unlikely to be worse than those of the other employes. But while the demand for those unusually well-qualified individuals tends to be increased by affirmative action pressures, the demand is *decreased* for minority or female applicants who are below average, or who do not have enough of a track record for an employer to take a chance.

Some recently published data on black males illustrates the point. Between 1967 and 1978, the income of college-educated black males rose dramatically, both absolutely and relative to the income of college-educated white males. In 1967, college-educated black males who were in the labor force a few years earned 74% of the annual income of their white counterparts. By 1978, this was 98%.

But over exactly the same span of time, black males with less education were falling further behind white males with less education. For example, black males who were in the labor force a few years, but who had less than 12 years of schooling, earned 79% of the annual income of white males of the same description in 1967. By 1978, that was down to 69%.

One may try to explain over-all black/white ratio changes by general economic conditions in the 1970s, rather than by affirmative action. But it is hard to explain diametrically opposite trends among blacks this way.

A more narrowly focused study of 50,000 academics showed a very similar pattern. Those black faculty members who had completed their Ph.D.s in highly ranked departments and who had published were earning more than whites of the same high qualifications. But those black faculty members who had not yet completed their doctorates and had not yet published earned less than their white counterparts. Again, the demand seems to have been artificially increased for the highly qualified black and artificially decreased for the more average black or the black who had not yet made a track record.

A number of responsible people have said off the record that they are reluctant to take on risks, with either minority or female applicants, because of the time and money that can be lost in legal proceedings if they later have to be discharged or even promoted more slowly. One black woman in a high position, when informed of this reasoning, replied that that was how she herself operated in considering applicants. "I have no time to spend at EEOC or in the courts," she said.

Affirmative action harms disadvantaged groups in other ways. The number of groups covered by this program has successively expanded to the point where it now includes a majority of the American people. George Gilder in his best seller "Wealth and Poverty" estimates the coverage at 70% of the population, controlling 75% of the country's wealth.

This means that blacks, for example, are lost in a sea of other people. Moreover by requiring employment decisions to be justifiable to third parties, affirmative action increases the importance of paper credentials — which are disproportionately lacking among disadvantaged minority individuals, even when they are perfectly capable of doing the work.

Like many other public policies, affirmative action needs to be judged by what it actually does, not by what it intends or hopes to accomplish. The crucial question is what incentives and constraints it creates—what it rewards and penalizes. We all know what road is paved with good intentions.

Even the supporters of affirmative action seem to sense its bankruptcy. They generally steer discussions as far away as possible from hard facts about the actual results achieved. They talk instead about history, as if this policy were going to be applied to the past instead of to the future. They impugn the motives of those who criticize their efforts, in a manner reminiscent of Sen. Joe McCarthy. In short, anything to evade the grim facts.

Quotas and preferences have been tried in a number of countries. Nowhere has any racial or ethnic group risen from poverty to prosperity by these methods, though many have done so by all sorts of other methods. The Chinese in Southeast Asia, Italians in Argentina, Germans in Brazil, Japanese in the United States, and Jews in various European countries have begun in poverty and ended in affluence, while avoiding politics. Where preferential treatment has been tried, it has not merely failed to achieve its object but has torn countries apart with internal strife. India, Indonesia, Malaysia and Guyana are just some of the places where such efforts have led to bloodshed in the streets.

After 10 years, it is time to ask what affirmative action has achieved for the disadvantaged, and what it has done to this country.

Mr. Sowell is a Senior Fellow at the Hoover Institution.

Senator **Nickles**. I am very pleased that this committee is making a very systematic commitment to look at the effectiveness of OFCCP and also at EEOC and the other Federal agencies that are designed with the good intentions of helping those who need some help, but oftentimes we find that those agencies are not able to satisfy those goals.

We now have an opportunity to consider restructuring the system to insure that equal opportunity for all is not lost in the shuffle of strict reporting requirements and punitive enforcement measures.

Mr. Chairman, again I wish to compliment you for your eagerness and willingness to take on this very difficult, politically sensitive, and politically nonprofitable area; and I join with you and pledge to you my cooperation and the cooperation of the Labor Subcommittee to do all that we can possibly do to end reverse discrimination and help get our country working again.

The **Chairman**. Thank you, Senator.

Senator Hawkins?

OPENING STATEMENT OF SENATOR HAWKINS

Senator **Hawkins**. Thank you, Mr. Chairman.

I am deeply committed to insuring that women and minorities receive an equal opportunity in all aspects of employment, like all members of this committee, but I have become increasingly concerned over the current method utilized by the Federal Government to reach this goal.

Most of the business and industry leaders to whom I have spoken share my concern that all members of society receive an equal opportunity to participate in the work force.

These employers are not paying mere lipservice to equal employment opportunity; they are business men and women who realize that it makes economic sense to hire the most qualified employee regardless of sex, religion, race, or ethnic origin.

If the chairman would indulge me just for a second, I would like to call the attention of the committee to a fascinating article that appeared in a recent issue of the Public Interest. The article entitled "Sex Discrimination: The XYZ Affair" recounts the efforts of one large company to explain its apparent record of discriminatory promotion.

To look into the facts the company hired a consulting firm which had done a great deal of work for plaintiffs in sex discrimination cases. In other words, the company deliberately hired one of the enemy to find out what the problem was.

The results were interesting: The researchers quickly found that men and women were promoted in precisely the same proportion as they sought promotion. The fact is that women did not seek promotion as often as men did and so were not promoted as often. When they did seek promotion they were promoted as often as men were.

The reason this case is interesting, Mr. Chairman, is that the problem—if there is a problem—cannot be solved by any kind of affirmative action program. In fact, as the research further indicated, an affirmative action program would have had a very bad result, forcing women into jobs they did not feel qualified for and keeping men out of jobs that they wanted. That is the kind of approach which has been taken under the color of affirmative action too many times, and it is among the issues that I hope this hearing will address.

On the chance that other members of the committee may find this article useful I am asking unanimous consent that it appear in the hearing record as part of my statement today.

The CHAIRMAN. Without objection, it is so ordered.

[The article referred to follows:]

THE Public Interest

NUMBER 62, WINTER 1981, PRICE: $3.00

Sex Discrimination?
The XYZ Affair
Carl Hoffmann & John Shelton Reed

Global Confusion, 1980: A Hard Look at the Global 2000 Report *Julian L. Simon*

Black English and Reluctant Judges *Nathan Glazer*

Welfare: Reforming Our Expectations *Bradley R. Schiller*

"Catastrophic" Health Insurance: A Misguided Prescription? *Christopher J. Zook, Francis D. Moore & Richard J. Zeckhauser*

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Reviews by Harry McPherson, Marc F. Plattner, Martha Bayles, Michael A. Scully, Mark T. Lilla, William Kristol, Peter Skerry, Seth Cropsey, Christopher Wolfe, and Natale Cipollina

Sex discrimination?—the XYZ affair

CARL HOFFMANN & JOHN SHELTON REED

GROUP differences in occupational success are a stubborn fact of American life. The legislative attack on discrimination which culminated in the federal civil rights legislation of the 1960's was intended to remove that component of these differences brought about by systematic discrimination against individuals on the grounds of race, sex, religion, and other group memberships. But it remains the case that, in many situations, members of some groups are still more often hired, retained, and promoted than others. The resulting shift of emphasis from equality of opportunity to equality of result, adumbrated in Lyndon Johnson's Howard University speech of 1965, has led to the emergence of two distinct schools of thought regarding the remaining differences between what have come to be called "protected groups" and everyone else. Nowhere has the contrast between these two views been sharper, or the debate more heated, than with regard to the occupational status of women.

On the one hand, some argue that the persisting imbalances result from continuing bias and discrimination on the part of employers, more subtle than the simple refusal to reward qualified women, to be sure; it may even be unintended. Such less-than-rational ways of doing business as seniority systems, or fixed lines of progression with no opportunity for transfer between lines, or irrelevant requirements of education or prior experience may well put unjustifiable barriers to advancement in the way of groups of employees or would-be employees, groups which may be disproportionately female. Proponents of this view argue that we cannot know to what extent parity would result from market processes until, in fact, parity is established. Differences in the attitudes and behaviors of men and women are seen as reflecting women's perceptions that the opportunity structure is closed to them. Affirmative action, "goals," and quotas are necessary to undo the "effects of past discrimination" and start things over on an equal footing. The implicit assumption is that, thereafter, equality of result should follow.

Another view, however, has it that even after all discrimination, blatant and subtle, is eliminated, "imbalances" will persist as a result of the tendency of men and women to make different choices—even when given the same range of alternatives to choose from. Women, in other words, are likely to seek out and to remain voluntarily in different sorts of jobs than men. Those who argue this position point to one or more of three factors (though seldom to all three) to support their conclusion.

In the first place, although it has become impolite to say so, there are at least some biological differences between men and women. Such differences explain why no women play for the Pittsburgh Steelers and none ever will (except perhaps as a place-kicker) unless the Steelers are subjected to involuntary "guidelines." It is at least possible that other occupations are wholly or partially closed to women for similar reasons, although the burden of proof should no doubt rest with someone who wants to assert that there is a performance-related, innate difference between men and women.[1]

A second factor sometimes adduced is that the early socialization of men and women tends to prepare them for different sorts of occupations. This fact may be deplored, but few would deny that it is at present and has always been a fact. For the time being, at least, sex-role socialization includes a strong occupational component. Men and women consequently enter the labor market with different abilities and aspirations (although this may be changing).

Finally, some point to the effects of traditional family roles on the job-related attitudes and behavior of husbands and wives (or those who expect to become husbands and wives). The traditional division of labor in the home will handicap even highly motivated and well-trained women, while it gives their husbands the freedom—indeed, the obligation—to seek occupational success. Particularly in a home where the husband is the only breadwinner, he is expected *to win bread*. And his wife is expected to support his efforts to acquire training and advancement.

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[1] It is considerably easier to demonstrate—or to assume without challenge—that the social fact of gender is job-related than to demonstrate that the biological fact of sex is. One thinks, for example, of washroom attendants.

These differences are especially acute when children are present. Rearing children is a compelling social function for women, one which competes with the demands of a job. Although this role is available to men, they are less likely (whether for biological or social reasons) to accept primary resposibility for it, and are more likely to be regarded as deviant if they do. *Their* responsibility to their children is likely to be seen and felt as one of providing material well-being, a responsibility quite consistent with striving for occupational success.

Whatever the basis for this view—whether it emphasizes biology, socialization, or current family roles—its implications are quite different from those of the view that sees most imbalance as resulting from discrimination of some sort. It implies that it is unreasonable to expect occupational parity between men and women soon, if ever, and that we should strive for equal treatment of individuals rather than equal results for men and for women. In particular, goals and timetables and all the rest will be and remain unwise and, in fact, illiberal. They will not have the desired effects, even in the very long run; they will undermine the economic organization of enterprise, by rewarding ascription rather than achievement; they will force employers to disregard not only their own interests but the desires of individual employees—desires the employer did nothing to produce.

Unlike the view of quotas as requiring, at most, a temporary sacrifice of economic rationality and fairness to individuals, this view has it that the sacrifice is permanent, for all practical purposes. The law should open opportunities and expand the range of choices for individuals—not interfere with rational business practice, individual decisions, or the fundamental institutions of society.

The policy debate

Clearly, in one view, employers are responsible for existing imbalances, ought to do something about them, and *can* do something without more than temporary and limited ill effects. In the other view, the situation results from factors outside employers' control, and (remediation aside) there is little employers can do that does not involve considerable and lasting cost to them, and injustice both to them and to individual employees. Obviously, it is important to know which view is more nearly, and more often, correct.

The Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs, the two federal agencies principally responsible for enforcing the law, have in effect assumed an answer. Their original and continuing interpretation of the law has been to require parity of results in hiring, promotion, pay, and so forth—even when no wrongful action has been demonstrated. If, for instance, the proportion of women among a company's supervisors is significanctly lower than the proportion among those from whom they are drawing, a *prima facie* case for discrimination exists, and the employer can be obliged to demonstrate either that the statistics are inaccurate or that the imbalance results from differences in other factors, such as education or prior experience. This last demonstration has sometimes been challenged successfully on the grounds that these "other factors" are not actually related to job performance.

In general, the courts have upheld the legality of this procedure and, both through approving the application of affirmative action procedures and through giving massive injunctive relief to aggrieved employees—requiring organizational and procedural changes on the part of employers—have appeared to agree with the view that parity is the "normal" outcome of a fair process. (On the other hand, the courts have recently upheld in some cases segmented labor forces, seniority systems, and the loose and amorphous standard of "business necessity"—decisions rightly seen as setbacks in the struggle for parity, if not for justice.)

Whatever the position of the federal agencies and the courts, however, it is not at all clear what measure of imbalance can reasonably be expected once all vestiges of illegal discrimination are removed. Will it be negligible, as their implementation of the law implies? Or will it be substantial, as several other lines of thought suggest?

It is difficult to answer the question empirically in even a single case, since the advocates of affirmative action are quite correct in their assertion that most companies have organizational features and practices that allow at least the *possibility* of discrimination against women. Few companies have internal labor markets with complete freedom of lateral movement: Most put employees into operative, clerical, professional, or management tracks and expect them to stay there; others [illegible] fect. Even fewer companies feel obliged to inform all employees of all openings within the company. Fewer still hire on the grounds of basic skills and potential ability, without regard to formal education or previous experience. And very, very few hire only at the bottom and fill all management positions from below with people who began in clerical or operative positions.

If such a company could be found, then the contentions of the two schools could be put to the test. If men and women advance in the company at different rates, if they are found in different proportions at different levels, then it must be the case that this results from differences they bring to their employment, not from discrimination. As it happens, we have just such a company, and have conducted just such a test.

In August 1978, the XYZ Corporation,[2] a Fortune 500 company, approached Hoffmann Research Associates,[3] a North Carolina consulting firm, to conduct a study of its personnel practices. The company's motive was not altruistic: A sex discrimination suit had been filed in one of its divisions, and it stood to lose a lot of money. The division of XYZ in question was one with considerable sales and clerical responsibility. It employed roughly 6,000 persons, of whom 5,500 were in entry-level clerical positions, and 500 in supervisory and management positions, ranging from assistant supervisor to senior vice-president.

The charges of discrimination had been filed by several female clerks who pointed to the fact that, while 82 percent of the entry-level jobs were filled by women between 1971 and 1978, female clerks were only 74 percent of those promoted in 1978 and only 61 percent of those promoted in earlier years. Promotion at XYZ was always from one level to the next. Men were obviously much more likely than women to be promoted at this first level (although at higher levels in the company there was no difference in the promotion rates of men and women).

XYZ made no attempt to dispute these figures, but its management could not explain them. Discrimination was forbidden; an entire district supervisory staff had once been dismissed for such practices; XYZ's management was sure employees were treated fairly. There were no differences in education, training, or experience that could explain the differences, and seniority was not a factor. Management insisted that only knowledge of the job, performance, and leadership played a part in promotion, but never asserted that there were differences between men and women in these respects. The president of the company had started in an entry-level job in this particular division. The management of XYZ was genuinely puzzled.

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[2] The company has asked that it not be identified. Otherwise, no restrictions have been placed on our analysis or our reporting on it.

[3] Carl Hoffmann is the president of Hoffmann Research Associates. John Shelton Reed served as a consultant to HRA during the later stages of data analysis and in the writing of the report. They gratefully acknowledge the various contributions of Rachael Tayar, Hunter Hughes, and Herbert Hyman.

Their choice of Hoffmann Research Associates (HRA) to conduct the study may speak to their belief in their own innocence. The research firm came to the attention of XYZ because of its work for plaintiffs—in support of cases very much like the one against XYZ. The research task was to determine the reasons for the lower rate of promotion for female than for male clerks, and to study another pattern that management had noticed, that of women being less likely than men to apply for lateral transfer within the company.

Trained interviewers conducted private, personal interviews, on company time, with independent samples of 363 female clerks, 283 male clerks, and 204 supervisors (102 male and 102 female). The samples were drawn randomly and proportionately from some 20 offices in all parts of the continental United States.[4] The questions of particular interest to HRA were embedded in a lengthy "job satisfaction" questionnaire.

Promotion-seeking behavior

Somewhat to the researchers' surprise, data analysis quickly made it clear that male and female clerks at XYZ were promoted in almost exactly the same proportions as they expressed interest in promotion. On the face of it, the difference in promotion rates for men and for women did not result from practices and policies that discriminated against women, but from a pattern of behaviors and attitudes that led male clerks more often than female clerks to seek and to accept promotion.

In the year prior to the survey, twice as many men as women (28 percent compared to 14 percent) had asked to be promoted, and the company's response was, if anything, more positive toward the women who asked than toward the men (See Table I on page 27; the difference is not statistically significant). Similarly, equal proportions of men and women had been asked if they were interested in promotion, but among those asked, men were nearly twice as likely as women to have indicated that they were interested. Altogether, 39 percent of the male clerks had indicated, in one way or another, that they would like to be promoted; only 21 percent of the female clerks had done so. (In earlier years, the difference had been even greater: Among those who had been with XYZ in 1977 and before, 46 percent of the men and 19 percent of the women said they had indicated their interest between 1971 and 1977.)

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[4] Possible sampling error of plus or minus 5 percent should be allowed for the samples of clerks, and somewhat more for the samples of supervisors. Added methodological information is available on request from author Hoffmann.

These ratios predict almost perfectly the relative rates of promotion for men and for women. Thirty-five percent of the clerks who expressed interest in promotion before 1978 were male, compared to 39 percent of those who were promoted; in 1978, 29 percent of those who expressed interest in promotion, and 26 percent of those who were promoted, were men. For both periods, the differences are small, and well within expected sampling error.

It seems reasonable to suppose that promotions will be offered more often to those who have indicated their availability, or at least not indicated that they are not interested. In fact, those who reported that they had sought promotion were twice as likely as the others to report that they had actually been offered promotion at some point.

We have one other indication of the behavior patterns that led to the observed differences in promotion. Ambitious clerks might stay well-informed about opportunities for lateral transfers, some of

TABLE I. *Self-Reported Promotion-Seeking Behavior, 1978 and Before.*[1]

	1978		1977 OR BEFORE[2]	
	MEN	WOMEN	MEN	WOMEN
Percent who requested promotion	28%	14%	30%	11%
Of those, percent reporting positive response	55	70	51	55
Percent asked whether interested in promotion	36	34	41	33
Of those, percent who expressed interest	74	43	69	35
Percent who indicated interest either way	39	21	46	19
(N)	(283)	(363)	(218)	(226)

[1] Source: Hoffmann Research Associates survey of XYZ employees.

[2] Asked only of respondents employed before 1978.

which offer more pay, responsibility, or opportunity. At XYZ, notices of openings are posted, and employees encouraged to "bid" on those that interested them. Twenty-five percent of the male clerks, compared to 10 percent of the female clerks, indicated that they followed the posted openings closely. If actual bidding practices reflected this ratio of interest, we would expect roughly 35 percent of all bids to have been from males. In fact, between 1973 and 1978, according to company records, 36 percent of the 5,708 bids by clerks were from men.

It appears, then, that male clerks at XYZ were promoted more often than female clerks to the same extent that they more often exhibited interest in promotion and engaged in promotion-seeking behavior.

Perceptions of discrimination can, of course, vary independently of actual practices. It would not be unprecedented to find a situation where some category of workers was subjected to systematic discrimination without being aware of it. Nor, in the present case, would it be surprising to find a widespread belief that female clerks were being discriminated against, particularly given the undeniable and striking differences in promotion rates and the present litigious climate.

But, as Table II on page 29 shows, although a good many respondents of both sexes were dissatisfied with various aspects of their jobs, only a negligible proportion complained about discrimination of any sort—sex, race, religious, or age—and males were more likely than females to complain. Female clerks were less likely than males to indicate that their own individual chances for promotion were "excellent" or "good," but when asked why they had not in fact been offered promotion, they were much more likely than males to indicate that they were known to be uninterested or that they were not qualified.

These data do not in themselves establish the absence of discrimination—any more than would widespread perceptions of discrimination establish its existence. But they do reinforce the evidence in the earlier analysis of even-handed treatment.

Aspirations and motivation

If, as we believe we have demonstrated, the difference in promotion rates between male and female clerks was not due to company policy or practice, the differences in behavior which did produce it remain to be explained. The explanation appears to lie in the fact that female clerks were likely to have lower aspirations than male clerks, less likely to have had the time or to have felt they had the ability for higher-level positions, more likely to have seen their employment as a "job" rather than as a stage in a career, and more likely to have sought better working conditions rather than advancement.

TABLE II. *Ratings of XYZ Promotion Policies and Perceived Reasons For Not Being Offered Promotion, By Sex.*[1]

	MEN	WOMEN
Percent saying "good" or "excellent"—		
Transfer policy	72%	80%
Policy of promoting from within	68	70
"An individual's" promotion chances	43	42
Own promotion chances	34	29
(N)	(281)	(360)
Reasons for not being offered promotion—		
Discrimination	3%	1%
Known not to be interested	27	41
Personality, personal history	19	10
Not qualified	14	25
(N)[2]	(230)	(300)

[1] Source: Hoffmann Research Associates survey of XYZ employees.
[2] Asked only of those not offered promotion in 1978.

Table III on page 30 presents some of the evidence on aspirations. Female clerks, it appears, were more likely than male clerks to have sought a clerical job specifically. Men were more likely to report that they were ready to accept any position that was open, evidently viewing their first position as simply an entree to the company. Men were also more likely to indicate an initial interest in a marketing job, while those women who did not seek to be clerks were more often looking for positions as secretaries or service workers. Men were somewhat more likely to desire to move from their present positions, and they thought of such moves in terms of promotion, while more than half of those women who wanted a change preferred to move laterally, to a position as a clerk of some other sort.

When we asked what these clerks' ultimate ambitions were, we found that women were twice as likely as men to be content with their present positions, and those who did aspire to higher positions set their sights lower than men: Only 14 percent sought positions above the level of supervisor, compared to nearly half the men.

In short, the women's ambitions, both for immediate advancement and long-term success, were more limited than the men's. This difference was present when they were hired; it was not something the company created.

Table III. *Past and Present Aspirations of Male and Female Clerks.*[1]

	Men	Women
Originally sought present position	45%	66%
Would like different position	67	57
Other clerical position	10	24
Supervisor, assistant supervisor, market representative	42	22
Ultimate aspirations Present position	21	39
Supervisor, assistant supervisor	12	27
Chief supervisor, manager	25	9
Executive	21	5
Other, don't know	20	20

[1] Source: Hoffmann Research Associates survey of XYZ employees.

Table IV. *What Promotion to Supervisor Would Mean, Responses by Sex.*[1]

	Men	Women
Would have to work more hours	63%	62%
Flexibility of hours would decrease	53	54
Harder to find someone to cover hours	73	70
Less access to desired shifts	47	44

[1] Source: Hoffmann Research Associates survey of XYZ employees.

Resource commitment and career

For most clerks, the first step up is promotion to assistant supervisor, a position which carries a modest increase in salary ($65.00 a month at the time of the survey), longer hours, rotating shifts, and a considerable increase in responsibility. Male and female clerks agreed (see Table IV, on this page) such a promotion would impose a number of burdens that they did not have to carry in their present positions. Unless one sees it as a step toward higher, and substantially more rewarding, positions—or unless one has few other commitments—there would seem to be little incentive to accept such a promotion if it were offered. We have seen already that men are more likely to see promotion in this light; it appears also they are likely to view other commitments as less inhibiting.

Table V on page 32 shows a number of attitudes and behaviors which bear on this question. Male clerks were willing or able to give up more, in general, to obtain promotion. They would have been more likely to accept a transfer, more likely to give up an optimal shift assignment. They were more likely to indicate that they had the time to devote to the job. While nearly half of the women said they would prefer to work only part-time, if that were possible, only 18 percent of the men shared that view; male agents were more likely to have worked substantial amounts of overtime.

For many more female than male clerks, the question of promotion was of little importance, because they did not intend to remain employed. Although the great majority of both male and female clerks planned to remain in the labor force, and had been in it without interruption, female clerks were significantly more likely than male clerks to plan to drop out, at least for a while, and more likely actually to have done so in the past. The most frequent reason given by men who had dropped out or planned to do so was to obtain additional education or training; a majority of the women indicated that their past or anticipated withdrawal from the labor force was for "family reasons."

Women, more than men, were unwilling or unable to make a number of sacrifices which, they recognized, career advancement requires. Moreover, a pattern of discontinuous employment, reflecting commitments other than to one's career, was more common among women than among men. Finally, women were substantially more likely than men to believe they lacked the ability to fill higher-level positions (see Table V). While the perceptions of female clerks—or, for that matter, those of male clerks—may be inaccurate, they can have the same effects as a real difference in abilities.

Table V also shows a composite index of motivation: Those who reported that they aspire to higher-level management, that they would give up a preferred shift schedule for promotion, and that they have the time and ability to be a chief supervisor are labelled "highly motivated." Men fell in this category twice as often as

TABLE V. *Trade-Offs Against Promotion, For Male and Female Clerks.*[1]

	MEN	WOMEN
Would prefer optimal shift assignment to promotion	33%	45%
Would not accept transfer to obtain promotion	12	28
Would prefer to have part-time job, if possible	18	44
Do not have time needed for chief supervisor's position	12	30
Expect to leave labor force for significant time before retirement	4	10
Worked less than 10 hours overtime per month last year	71	83
Voluntarily out of labor market for significant time in past	5	13
Do not have ability for chief supervisor's position	8	26
Composite index of motivation (see text)—"highly motivated"	61	31
(N, range)	(279-283)	(354-363)

[1] Source: Hoffmann Research Associates survey of XYZ employees.

women; 61 percent compared to 31 percent. This difference in motivation goes a long way toward explaining the observed difference in promotion-seeking behavior. As Table VI on page 33 shows, there was no difference between men and women with low motivation: Neither group was likely to have sought promotion. Those with high motivation were much likely to have done so—twice as likely if they were women, three times as likely if they were men.

Effects of marriage and parenthood

But why were women who were apparently motivated to seek promotion less likely than men actually to have done so?

The breakdowns by marital status which appear in Table VI suggest an answer. The differences between unmotivated men and women were relatively small, as were those between highly-motivated, *unmarried* men and women. *The largest difference between men and women in the table is that between highly-motivated married men and highly-motivated married women. Marriage appears to increase promotion-seeking among highly-motivated men and to decrease it among highly-motivated women.*

The male and female respondents were about equally likely to be married: 47 percent and 48 percent respectively. But while 21 percent of the males were married men with dependent children, only 10 percent of the women were married, with children at home.

TABLE VI. *Promotion-Seeking Behavior By Motivation, For Male and Female Clerks, Married and Unmarried.*

	PERCENT SEEKING PROMOTION (N)	
	MEN	WOMEN
Low motivation	16%	16%
	(114)	(249)
Unmarried	14%	20%
	(65)	(127)
Married	20%	12%
	(46)	(122)
High motivation	53%	33%
	(172)	(111)
Unmarried	47%	36%
	(88)	(61)
Married	60%	30%
	(84)	(63)

[1] Source: Hoffmann Research Associates survey of XYZ employees.

Evidently, female clerks were more likely either to have deferred child-bearing or to have dropped out of the labor force while they had dependent children. It may well be that the effects of marriage and parenthood on women would be even more pronounced than they appear to be if the sample of mothers were not self-selected to comprise those most committed to their jobs or most able to cope with conflicting demands of job and family.

For nearly all of our measures of motivation, commitment, promotion-seeking, and perceived ability to meet the demands of a new position, the effect of marriage—marriage *per se*, without the added complications of child-rearing—was to reduce the likelihood of promotion for women, on the average, and to increase that for men. Nevertheless, the company appears to have inquired about interest in promotion with an even hand: Among the unmarried, 32 percent of both male and female clerks reported that they were asked whether they were interested; among the married, who tended to be older and more experienced, 40 percent of the men and 36 percent of the women reported inquiries.

One implication of this analysis is that married male clerks were more likely than married female clerks to come from households where their job was seen as the principal career within the family. Table VII (page 34) confirms this. The demands of male clerks' jobs were usually seen as determining; female clerks had more often to compromise between the demands of their jobs, on the one hand, and those of their husbands' jobs and their own household responsibilities, on the other. These women were most often economic equals with their husbands, while their male colleagues usually had *the* economically important jobs in their families.

Thus, though practically none of the male clerks would have given up his job with XYZ if his spouse's career required a move, roughly half of the female clerks would have done so (but not all, by any means). Similarly, nearly all of the male clerks would expect their wives to follow them, if their XYZ jobs required a move; about half of the female clerks would expect their husbands to move with them. While nine out of ten male clerks said that their job was the most important in the family, female clerks were more evenly divided, and frequently volunteered that their jobs and their husband's jobs were equally important.

TABLE VII. *Indicators of Occupational Primacy Within Family, By Sex (Married Respondents Only).*[1]

	MEN	WOMEN
Would give up XYZ job if spouse's job required a move	4%	53%
Spouse would give up job if respondent's job required a move	92	55
Respondent's job more important to family than spouse's	90	34
Spouse's job more important	4	50

[1] Source: Hoffmann Research Associates survey of XYZ employees.

These impressionistic data are confirmed by a look at income figures. Female clerks, on the average, earned only slightly less than their husbands (about $400 a year) and 45 percent earned more. But 92 percent of the male clerks earned more than their wives, and the average income difference was substantial—especially, of course, for the 34 percent whose wives were not in the paid labor force at all. (Less than 1 percent of the married female clerks had husbands who were not in the paid labor force.)

Marriage means different things for male and female clerks. Most often, a married male clerk finds himself with a household primarily or even completely dependent on his present and future earnings. He usually expects that his family will adjust to the demands of his career. Those demands are in a strong position in the competition for his time and attention, and he faces no choice between his family role and his job: To a large extent, his family role *is* his job. But female clerks showed no consistent pattern of either primacy or subordination in the economic lives of their families. Their career decisions often required compromises, which need not go against their career interests, but would not necessarily favor them either.

The effects of parenthood were like those of marriage, only more so. It increased men's desire for promotion and their efforts to achieve it, and decreased both among women. The male and female clerks in our sample did not differ in their desire for additional children: 43 percent of the women and 42 percent of the men intended to have them. But the effects would be quite different: 17 percent of the women who planned to have children did not intend to remain in the labor force until retirement; only 4 percent of the men who planned to have children expressed an intention to leave, a figure virtually identical to those for male and female clerks who did not plan to have more children. Similarly, 28 percent of the female clerks who had children had been out of the labor force in the past, compared to 3 percent of the fathers in our sample. Childless female clerks, and male clerks with and without children were likely to have worked overtime and reported that they were available for any shift assignment; but mothers of children under 18 years, not surprisingly, reported less flexibility.

While parenthood, like marriage, means added responsibilities for both men and women, the responsibilities of wives and mothers conflict with their on-the-job behavior in ways that those of husbands and fathers do not. In this case, it limited women's ability to devote extra time, perhaps at unusual hours, to their jobs—an ability which these clerks recognized is required of supervisors.

Female supervisors

Many female clerks resolve the conflict between their household responsibilities and their husbands' careers, on the one hand, and their own careers, on the other, by lowering their levels of aspiration and by avoiding the added responsibilities that would accompany promotion. Another possibility, of course, would be to remain single, or childless, as had many female supervisors who sought, were offered, and accepted promotion. Although they were roughly the same age as male supervisors, only 46 percent were married, compared to 81 percent of the men, and only 9 percent had children under five years old, compared to 34 percent of the men.

Married female supervisors were much more likely than married female clerks to report that their job was the more important one in their household. Although only 22 percent of the female clerks consistently reported that their jobs were more important than their spouses', 42 percent of the female supervisors did so (compared to 78 percent and 77 percent of male clerks and supervisors, respectively). Sixty percent of the female supervisors earned more than their spouses, compared to 45 percent of the female clerks (and 92 percent and 94 percent of male clerks and supervisors, respectively). Six percent reported that their husbands are full-time homemakers, a response given by only one of 175 married female clerks.

In these respects, male clerks, in general, already "looked like" male supervisors: Nearly all of both groups came from households where their economic responsibility was, both psychologically and in fact, the principal one. Female clerks, as we have seen, were much less likely to be in that situation. Female supervisors, though, fell somewhere in between.

The pattern is repeated when we look at Table VIII on page 38. In nearly every respect, supervisors differed from clerks of the same sex in those characteristics that we have identified as important for promotion—characteristics that male clerks were more likely than female clerks to display. But notice two things about the table: In the first place, male clerks by and large thought and behaved more like supervisors than did female clerks (an implication of our earlier analysis). In the second place, and importantly, female supervisors differed relatively little from male supervisors. They displayed comparable levels of motivation, similar attitudes, and similar behaviors—and they had been rewarded for that with promotion.

Some, as we have noted, did this by avoiding marriage and parenthood, others by entering into marriages where the principal economic responsibility was theirs. In general, our data showed that the effects of marriage on the attitudes and behaviors of female supervisors were usually negligible, and as often in the direction of increasing motivation and promotion-seeking behavior as of decreasing it—a striking contrast to the situation for female clerks.

In short, those women who sought and accepted promotion at XYZ were disproportionately women who, whether willingly or through force of circumstances, had avoided the pattern of aspirations, values, and behavior which led many of their female coworkers to choose not to compete for promotion. They displayed characteristics which resembled those of male clerks and supervisors, and which set them off from many female clerks. In part, this is because many had remained unmarried, and few of the married women had small children. But even those who had married showed high levels of the promotion-related characteristics we have been examining: Marriage simply appears to have had less of an inhibiting effect on their aspirations and behaviors than on those of female clerks generally. The reason seems to be that they were more likely to have a household division of labor like that of their male co-workers, in which their occupational success played an important, even a primary, part.

Discrimination?

Did the relatively low proportion of women among those promoted reflect discrimination? Clearly the answer is no. It reflected differences in the behaviors and attitudes of male and female clerks —differences the company and its policies had no part in producing. These differences decrease as one moves up the organizational ladder, reflecting self-selection at each step: Those women who are prepared to seek and to accept responsibility are as likely to be promoted as men who do so.

Even at the supervisory level, though, some of the differences persisted, as we have seen. It should come as no surprise to learn, then, that XYZ's records show a much higher rate of voluntary self-demotion among female supervisors than among their male colleagues, and that the reasons given by women usually involve family demands or moves to a new locale required by their husbands' jobs.

If this survey had not been conducted, XYZ would almost certainly have lost the lawsuit, paid million-dollar damages, and been subjected to injunctive procedures setting up goals and timetables for the elimination of discrimination. If that had happened, it would have had unfortunate consequences for nearly everyone concerned.

In the first place, and obviously, male clerks who otherwise would have been promoted would have been passed over. Perhaps less obviously, female clerks who neither sought nor desired promotion might have faced pressure to accept it, resulting either in inadequate performance in higher-level positions or in stresses and forced changes in their family lives.

From the company's point of view, perhaps the worst feature of such an outcome would be the resulting deformation of its present structure of opportunity and rewards. XYZ Corporation has been the most successful company in its industry for years despite—or because of—the fact that it does not have a "management track." The excellence of its management depends on a screening process

TABLE VIII. *Promotion-Related Characteristics, By Sex, Among Agents and Supervisors.*[1]

	AGENTS		SUPERVISORS	
	MEN	WOMEN	MEN	WOMEN
Prefer promotion to desired shift	67%	54%	88%	86%
Aspire to higher management	79	60	88	82
Summary index of motivation "high"	61	31	75	75
Would not prefer part-time job	82	56	75	78
Household responsibilities do not restrict hours available	96	92	95	98
Worked overtime in past year	91	86	91	93
Have expressed interest in promotion	39	21	63	61
Follow postings of transfers	25	10	21	6
Would accept promotion to assistant supervisor	66	52	*	*

[1] Source: Hoffmann Research Associates survey of XYZ employees.

* Not applicable, since supervisors have already accepted a promotion.

at all levels of the organization that identifies talented people, committed to the company, and rewards them for initiative, leadership, knowledge of the job, and competitive spirit. Promoting people on the basis of group membership would be as alien to the company's way (and, management believes, as damaging to morale) as promotion on the basis of seniority or some other arbitrary standard.

If, as a result of the suit, XYZ were obliged to promote women less qualified or less committed than those employees who are now promoted, it might be necessary either to lower performance standards for all supervisors or for female supervisors separately—inviting either an overall deterioration of performances or difficulties when promoting out of the ranks of supervisors. If it maintained its present standards for supervisors, it would find either much higher rates of voluntary demotion among women (aggravating a pattern that already exists) or it would be necessary to invite another lawsuit by demoting more women involuntarily. A sorry mess all around.

Whatever happened, the consumers of XYZ's services would face higher prices to pay for the settlement, and would pay for the injunctive relief through the deterioration of service, if not through higher prices.

In short, equality of opportunity and equality of result appear to be antithetical at the XYZ Corporation. Those who argue for the latter rather than the former are eager to tamper with a complex, competitive system, and their search for simple solutions to complex problems may upset the engine of our prosperity—which relies on individual initiative and competition for rewards. In the long run, family structure, sex-role socialization, and child-rearing practices may change to accommodate women's participation as equals in the paid labor force. If so, they may attain equality of position, power, and reward in the economy. But while the family, socialization, and child-rearing may change, scarcity and competition and the need for economic growth and increased productivity will not.

We are not arguing against the application of the Civil Rights Act where discrimination truly exists. We argue here against the criteria for discrimination applied by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs, the agencies charged with enforcing the act. A criterion of parity, the insistence that a category of individuals is entitled to rewards proportionate to its numbers and not to its members' performances, does not serve the common good. It is, in fact, antithetical to the social contract, implicit in the American tradition: An individual is entitled to the fruits of his labor, and group membership—whether in a hereditary nobility or a "protected group"—does not entitle him to benefits. This argument against the ideology of quotas is not new; it has been put better by others before, but it does not seem to be prevailing. It should.

What is a company's obligation to its female employees? It is obliged to offer them the same opportunities as men, and to reward them in proportion to their productivity. No more. It cannot, indeed *should* not, compensate women—or anyone else—for effort expended in the service of other commitments. The inequities (if such they are) of early socialization or of the division of labor in the American household are not the responsibility nor the business, in any sense of that word, of an employer.

If a company is so moved, however, it might reasonably seek to rationalize both its internal labor market and its relations to the external market—examining its seniority systems, lines of progression, training programs, and so forth. In these areas, employers may find that they can serve the interests of their employees from "protected groups" while serving their own as well, by expanding the range of opportunities for *individuals*, and rewarding those who seize them.

The CHAIRMAN. Our first witness today will be Robert Beck, chairman of Prudential Insurance Co., and any witnesses he cares to bring with him.

We will ask you, Mr. Beck, to please take the witness chair at this time. It is an honor to have you here, and we are looking forward to your testimony.

STATEMENT OF ROBERT A. BECK, CHAIRMAN, PRUDENTIAL INSURANCE CO., ACCOMPANIED BY EDWARD LAWSON, VICE PRESIDENT, EQUAL OPPORTUNITY PROGRAMS; JOHN SCHNEBLY, VICE PRESIDENT AND LABOR COUNSEL; AND TOM O'HARA, VICE PRESIDENT, GOVERNMENT AFFAIRS

Mr. BECK. Thank you very much, Mr. Chairman, and good morning.

My name is Robert A. Beck. I am chairman and chief executive officer of the Prudential Insurance Co. With me are some of my associates who have been deeply involved in the affirmative action effort for many years.

I am pleased to appear before you at this congressional oversight hearing on the regulatory process, a review activity which is both appropriate and overdue.

I was particularly pleased to hear your opening statement because that is so consistent with our own views that I almost decided to skip my notes, but I would like to make the statement anyway.

Affirmative action and equal opportunity is a subject which does receive special attention in the Prudential, one in which we have a great deal of experience. Some of it has been rewarding; some has not. That is why I appreciate the opportunity to tell you the Prudential's story. It is a graphic illustration, in my judgment, of overreaction and irresponsibility in the regulatory process.

The Prudential Insurance Co. is a Federal Government contractor. We underwrite major group insurance programs covering Federal employees and their families. We administer the servicemen's group life insurance programs as well as medicare benefits for social security recipients in New Jersey, North Carolina, and Georgia.

Our association with these programs not only contributes to the financial security of their participants but assists the Federal Government in providing important social services.

Just 1 year ago the then-Secretary of Labor approved the recommendation of the Office of Federal Contract Compliance Programs and signed an order to debar Prudential from these Federal contracts.

Had Prudential not instituted a court action which blocked that debarment order, here is what would have resulted:

It would have required renegotiation of group insurance contracts on more than 200,000 Federal employees with insurance companies willing and able to provide similar benefits.

The Veterans' Administration would have had to select a new administrator for the servicemen's group life insurance program which involves more than 3.5 million participants, $73 billion of insurance, and coordination with about 400 participating insurance companies.

Medicare benefits for 2 million recipients in three States would have been interrupted. To give you a better idea of the extent of our responsibility in this one activity, last year it involved over 12 million claims totaling $866 million in benefits.

The jobs of more than 1,300 Prudential employees, many of whom are either minorities or women, would have been jeopardized.

One must wonder whether there was any consideration whatever of the impact of such drastic action.

What did Prudential do to deserve such punitive action? OFCCP made no findings of discrimination. There was no hint that we failed to meet our goals. It was simply a disagreement over the scope of discovery.

OFCCP was on a fishing expedition. They wanted far more information than they needed, far more than they had staff resources to review, and much of what they sought was of a confidential nature.

In order that you may better appreciate the uselessness of all that, let me place it, I hope, in its proper perspective.

More than 50 million people have a stake in the Prudential Insurance Co. Through our individual, group life, health, and pension insurance products, we provide financial security to millions of families. More than 125,000 businesses rely on our group security and employee benefit programs.

We are one of the largest investment managers in America. We manage pension funds for more than 3,000 clients, companies of all sizes, labor and management pension programs, business employee retirement systems, and so on.

For business and industry we are an important source of capital, pumping billions of dollars into the economy through loans to businesses and investments in real estate development.

We furnish employment opportunity for tens of thousands and contribute to the prosperity of hundreds of communities throughout the country.

At yearend 1980 we had a total staff of 69,000 employees assigned to over 1,500 administrative, claim, investment, and sales offices. We have affirmative action programs covering each of these 1,500 offices.

Since the beginning of the Executive order program in the mid-sixties hundreds of Prudential facilities have been the subject of compliance reviews, and all have been satisfactorily concluded. That fact is evidence not only of our commitment to the objectives of the program but also the spirit of cooperation with which we have approached the agency's obligation to monitor our progress.

In 1975 an extensive compliance review of Prudential's corporate headquarters and lengthy discussions with Government officials which followed—discussions in which I personally participated—resulted in the conciliation agreement between Prudential and the Department of Labor.

This conciliation agreement covered changes in our affirmative action programs and resolved all issues relating to affirmative action prior to 1976.

It is against this backdrop that the agency commenced a compliance review unique as to its scope, intensity, and character.

In May 1979 we were notified OFCCP would conduct a single compliance review of 99 Prudential facilities in New Jersey and metropolitan New York where some 14,000 employees are located.

As a high visibility company in a targeted industry we anticipated a thorough review but not a hostile one.

Less than a week after we had organized and submitted over 7,500 pages of requested information, including 99 affirmative action programs, we received written demand for any and all computer tapes containing personnel information or data.

Our computer people determined it would have been necessary to review 2,600 reels of computerized data just to determine if that material fell within the scope of the Government's request.

Shortly afterward representatives of the Labor Department advised us that their investigations would be conducted without regard to the terms of the conciliation agreement which I referred to earlier.

In other words, the OFCCP was taking the position that the conciliation agreement—a binding commitment which was the culmination of extended good faith bargaining—was now considered a nullity. In the blink of an eye they had repudiated their own agreement.

During the 2 years that were to follow OFCCP demands for employee data and information on personnel practices far exceeded even the most cavalier interpretation of relevance.

For 2 years detailed investigations of virtually every employment practice and every personnel transaction were pursued by the agency with suspicion and doubt.

In spite of the fact that we questioned the need for or relevance of computerized material we offered to provide to the OFCCP computer tapes with deletions of confidential information which, if released, would compromise the privacy rights of our employees.

The agency said that offer was unacceptable and indicated enforcement proceedings would be commenced.

The CHAIRMAN. Let me ask you something right there. Does the OFCCP even know what to do with those data even if it got them?

Mr. BECK. There was no way that they could have done anything with it.

The CHAIRMAN. So you are indicating—at least I am getting implied indications—that this was just officious and arbitrary on their part?

Mr. BECK. Yes. In fact, I would add further that the information we had earlier submitted had not been reviewed at all before they decided to extend those data demands in terms of asking for additional information.

The CHAIRMAN. I do not mean to interrupt you; it just seems startling to me.

Mr. BECK. After a delay of 6 months, during which the Government made no effort whatsoever to seek an amicable resolution, OFCCP filed an administrative complaint under so-called expedited hearing rules.

An ambiguous determination by an administrative law judge led to a Sunday evening order of the then-Secretary of Labor debarring Prudential from Federal contracts.

The CHAIRMAN. Who was the then-Secretary of Labor?

Mr. **Beck**. That was Ray Marshall.

When the Labor Department announced its action against Prudential it did so at a press conference in Washington at 10 o'clock the following morning, which of course is ideal for the television networks. We learned of the announcement only when we began to receive telephone calls from reporters.

To contest an administrative determination, which we felt was not only arbitrary and capricious but which appeared to be orchestrated even before commencement of the review, it was necessary to seek relief in the U.S. district court.

The subsequent court-assisted resolution of the case reserved the privacy rights of our employees. It forced the Labor Department to live up to the terms of the conciliation agreement.

While we proved that there are limits to the demands Government agencies can impose, that should never have been necessary in the first place.

The Birmingham Post-Herald pointed out that Prudential had the resources and willingness to fight for its rights.

The **Chairman**. I think that is an important point. How many thousands and thousands of small business people just have to cave in to whatever they want them to do? If they are making these arbitrary demands on you, I cannot even begin to tell you what they are doing to the small business people throughout this country.

I do not mean to keep interrupting you. Please go ahead.

Mr. **Beck**. Senator, we would concur. If it were any company other than one of the largest, the chances are very good they would have had no alternative but to capitulate.

The **Chairman**. It is either capitulate—which is in the nature of capitulating to a police state type of set of orders—go bankrupt, or go out of business.

Mr. **Beck**. There is no alternative.

The **Chairman**. You know, as I have gone up and down this country I have had literally thousands of small business people saying to me:

> Hey, how about giving me one of those Federal Government jobs where I don't have to worry anymore, where I have good fringe benefits and good vacation rights, where I don't have to carry people on my back, and I don't have to fill out these unnecessary Federal Government forms, and—above all—I don't have to put up with the OFCCP and EEOC and all of their onerous and burdensome requirements?

I am seeing small business people getting out of business all over this country for no other reason, and they all want to work for the Federal Government for some reason. I imagine you have some sympathy for them as a result of what you are saying.

Mr. **Beck**. I do, at that.

Our national affinity for conflict and confrontation is self-destructive. When Judge Stern signed the order resolving our dispute with the Labor Department he said:

> I would urge the Government not to impose the most draconian measures—measures which can only have substantial impact on totally innocent people. It is a terrible thing to have to fear one's own government.

The **Chairman**. I am sorry to interrupt you again. I had not read your statement before I got here. I had read some of them, but I had not read yours.

This bothers me a great deal because I agree—Prudential probably can afford this, although I suppose you pass these added costs on to your policyholders just like any other business does.

Mr. **Beck**. Of course.

The **Chairman**. So in the end that is another hidden, cruel tax caused by the onerous and burdensome requirements of the Federal Government. Is that right?

Mr. **Beck**. That is totally true. In fact, it is not only that the costs are passed on, but there is the absolute waste in terms of management time and employee time throughout the company.

The **Chairman**. Are you going to get into that?

Mr. **Beck**. Yes, sir.

The **Chairman**. OK. Are you going to get into any reasons you think they are this officious?

Mr. **Beck**. Yes, sir.

The **Chairman**. I do not want to interrupt if you are going to get into that.

Mr. **Beck**. Please interrupt at any time.

The **Chairman**. I will tell you something. I have had people coming out of my ears—little people all over this country—who are so upset at the miserable, ruthless, officious, peremptory way that they are treated by this agency, by the EEOC, and I might add by a plethora of other agencies in the Government.

I have to believe that is one of the reasons there are so many changes occurring in our country today. In fact, I think it is the biggest reason. People are just sick of the Federal Government, and they are sick of this kind of authority.

Although you can afford to pay for this, I am getting the impression that you are pretty darn sick of it, too.

Mr. **Beck**. Not only sick of it, Senator, but we have determined we are going to fight.

The **Chairman**. You are darn mad, too.

Mr. **Beck**. That is exactly right. We are going to commit our resources to fight these issues whenever we think they are wrong.

The **Chairman**. What burns me up is that everybody is afraid to talk about these issues. I think it is long overdue when some of us have the courage of our convictions to stand up and stop this kind of—we have some words for it out in Utah that I will not repeat here—this kind of bad conduct.

I know it is not easy for any business person to come in here and testify against a Federal Government agency with which they have to deal every day. Maybe you have the resources to be able to do it better than others, but I am just telling you: I respect and admire your coming in and bringing this information to us.

I also want everybody to know that the OFCCP will be in here, and if they disagree with you they will have the right to say so, but I may want to give you another opportunity to read their testimony.

Mr. **Beck**. I will be glad to.

The **Chairman**. Please continue.

Mr. **Beck**. Government regulators, it seems to us, must begin to view their roles differently; and, of course, business, in turn, must be willing to recognize the legitimate interests of Government and must be willing to cooperate with it.

What is the net result of this confrontation we have with the Labor Department, which is now in its third year with no end in sight?

So far, Prudential has invested more than $1.5 million in this one single compliance review. Many of our normal business activities have been disrupted. The adverse publicity resulting from the attempted debarment provoked anxiety and doubts in the minds of our policyholders. The Labor Department has gained little beyond what we offered when they first requested computer tapes. Not one substantive deficiency has been brought to our attention.

The CHAIRMAN. Not one in all of this?

Mr. BECK. No, sir.

Most important of all, this entire process has not provided a single member of a protected class with new employment.

The CHAIRMAN. I think that may be the most important point you have made here: With all of this gibberish you have gone through, not one thing they have done has helped to create a job for a so-called protected class potential employee.

Mr. BECK. I am absolutely convinced that the point you made in your opening statement is absolutely valid: The OFCCP has forgotten its mission and has gotten lost in a different kind of battle.

The CHAIRMAN. If they are that way, can you imagine how many other Federal agencies have forgotten their mission?

I will give you an illustration. I had to give a speech to a convention that had 6,500 handicapped people there. It was at the height of the Reagan so-called budget cuts, which are less than one-half of the increases in taxes between 1980 and 1981. I was standing there waiting to go on to the stage, and I was near a bunch of Federal bureaucrats who work with handicapped programs.

One of them said—and I was absolutely shocked by this—"Let's forget about the handicapped; let's save ourselves."

I do not mean to demean Federal employees, but I think there is all too much of that throughout the whole bureaucracy, and it is about time we started to look at these things.

But go ahead. I am interrupting you too much.

Mr. BECK. We have estimated, Senator, that Prudential's costs incurred in connection with the Office of Federal Contract Compliance Program exceeds $5 million annually. This figure is based on estimates by our management of the additional costs that are a direct result of our affirmative action programs which would not otherwise have been incurred in the normal conduct of business.

It has been estimated that the annual cost of compliance for all Federal contractors exceeds $1 billion annually.

In fiscal year 1980 OFCCP spent almost $32 million on compliance reviews in which there was no finding of discrimination. Add to that another $40 million in contractor costs for reviews in which there was no finding of discrimination. Most of that $70 million could be put to work productively.

Cost figures such as these lead to but one conclusion: There must be a better way.

The Labor Department now is searching for a better way. However, its proposals for modifications of existing regulations represent little more than tinkering with the regulatory structure.

While some of the amendments make the program less burdensome, the Department's proposal will not make the program more effective, nor will they end the regulatory overlap between the EEOC and the OFCCP—its most burdensome aspect.

The CHAIRMAN. Let me just reemphasize that. I am telling you that I know that is true. I have studied it, and I believe that what the Labor Department has done is primarily cosmetic.

They just want to shove this problem under the rug again and not face the difficulties of what these agencies are doing to mess up America; and really, in the end, not give people chances for employment; and agitate everybody to the point where people do not want to be in business anymore—it just is not worth it to them.

Nor do they want to take the burden of hiring people, especially underserved, ill-educated minorities who may then bring all kinds of complaints under these so-called rules and regulations. They do not want to hire them because they are afraid that they will have problems, more problems than they had ever thought about.

Instead of making it a cooperative thing where business has real incentives to hire the young blacks, 36 to 37 percent of whom are unemployed today, they have thrown every stumbling block in the way; and these agencies have become, in my opinion, some of the biggest stumbling blocks to real protected-class employment in this country. That is the thing that is just killing me.

I cannot understand why we do not wake up and realize that. In our zeal to regulate and—I might add—overregulate, we are just ruining opportunities all over this country.

On the other hand, I know we are going to get into this, too: There are some businesses that really need their hands slapped, too.

Please go ahead.

Mr. BECK. We believe the purpose of affirmative action is to make something happen. It means more than "business as usual." It is evidenced by positive efforts to insure equality of treatment or to assist and encourage minorities and women in taking advantage of job opportunties.

The agency's insistence on rigid adherence to fictional availabilities is often counterproductive and forces contractors to play the numbers game.

The existing program fails to address the fundamental issue of how to effectively increase the supply of minorities and women with necessary skills to fill existing job opportunities.

Administration of the program lacks provision for meaningful voluntary compliance. Enforcement is marked by an adversarial atmosphere of threat and intimidation.

Moreover, the agency seems to operate on the presumption that constant and rigorous regulation of a few large companies will cause the remainder of the contractor community to fall into line.

It is ironic that those employers with the best track records in affirmative action, such as General Electric, Sears, A.T. & T., General Motors, and—yes—the Prudential, are the targets of continuing compliance enforcement.

The inadequacy of selective enforcement is illustrated by the fact that each year fewer than 1 percent of all Federal contractors are reviewed, and often these are the same companies reviewed in previous years.

We think it is time to step back and reexamine an Executive order program which has been universally criticized to draw on its strengths and eliminate its weaknesses, and that cannot be accomplished with band-aids.

This administration has a golden opportunity to redirect the regulation of employment policies of Federal contractors, to mandate a positive approach to affirmative action rather than a negative one.

I believe it is possible for Government and private enterprise to launch a cooperative effort which allows for innovation and utilization of talent within the private sector.

In the past decade social responsibility has been emphasized by American industry. A more direct focus on affirmative action is a natural extension of that philosophy.

With the enlightened guidance of Government we can mobilize the business community, labor, and private interest groups to address these problems. We should marshal our resources and invest them wisely in programs which will expedite the training and placement of minorities and women in marketable skills and jobs.

The resources that we have heretofore spent on unnecessary reporting requirements, bureaucratic duplication, and preoccupation with unrealistic quotas could be better spent on programs where the action is indeed affirmative.

An Executive order which corrects current deficiencies and presents a new and innovative approach to affirmative action, one which incorporates significant employer incentives for voluntary compliance and directs utilization of the OFCCP's resources in a positive fashion, has the potential for producing a program which lives up to its promise.

That concludes my statement.

The **Chairman**. Thank you so much, Mr. Beck.

Your negative experience with the OFCCP and that of others is why this committee needs to do all within its power to stop the abuses by that office.

The judge in your case was right—and I think you have well pointed that out—when the judge said: "It is a terrible thing to have to fear one's own Government."

I do believe the agency has lost sight of what it is supposed to do and has not had the capacity to evaluate or care about its impact on our economy. I am pleased to see that you agree that the proposed regulations are merely a tinkering with the structure and hardly a constructive way of solving the problems that they are intended to solve.

I have written to the President requesting that he postpone the publishing of those regulations until we have heard from people like yourself in hearings such as these.

I want to commend you for the courage you have had in coming here. I will be frank in telling you: There are a number of business people who just do not want to get involved because they are afraid they will have more oppression than they have got now, and they cannot stand anymore. They just plain do not want to have to come out in public and say "these people are killing us" because they cannot stand any more of the oppression that they have gone through already.

I also agree with your point that there has to be a better way. I think that was the point you were making, and that is why we are holding these hearings. And it is not easy to do.

We have had a lot of criticism throughout the country because we have had the temerity to look into affirmative action programs. Whether they work or not, it is the symbol of those programs that is important. I think the symbol of America is freedom, the right to compete, and the right to compete without unfair Government molestation.

I think we will, before these hearings are over, come up with a better way—at least we hope so.

I would encourage you to encourage the President of the United States and others to not be taken in by cosmetic changes at this time. Let us look at this thing, and let us see if we can get this so it works to the benefit of the people who really need the help. That includes both the minorities and women who are underserved and business that has to provide these jobs. Every time we stifle business we stifle opportunity.

That is not failing to recognize that there are some gutless business people in this country who are unwilling to do what is right for minorities and women in this country. There are some in this country who personally may be prejudiced, but I think they are the minority. I think we have good will in this country. I think we can do a lot of voluntary things that have never been done before.

I have heard wherever I have gone a pretty darn good response from business people all over who say, "If we could get the Federal Government off our backs we think we could do a better job without their assistance."

Let me just ask you this: Did the OFCCP at any time examine what goodfaith efforts you have made in bringing more women and minorities into the general work force and into Prudential specifically, or did they ask you what affirmative action steps you had taken?

Mr. Beck. No, they did not. It was clear that they had no interest in it.

The Chairman. In other words, theirs was a prosecutorial, investigatory approach which presumed your guilt before they even talked to you.

Mr. Beck. I would also try to place this into a perspective that I think is meaningful. If all business—and all Government, I might add—hired minorities at the same rate we hire minorities in the Prudential Insurance Co., there would be no unemployed minorities in the United States.

The Chairman. That is an interesting comment. What triggered the review of Prudential by OFCCP?

Mr. Beck. I really think that it comes about because of EEOC having its turf and the OFCCP having its turf and a concern about OFCCP losing its power and being compelled to be dragged into the EEOC.

The **Chairman**. Were there any allegations of discriminatory conduct against Prudential that they could use as a basis to make these kinds of fishing ventures into your business?

Mr. **Beck**. Never.

The **Chairman**. Not any, to your knowledge?

Mr. **Beck**. No.

The **Chairman**. When OFCCP requested you to provide them with more information, did they indicate why? That is, did they have data that made them suspect problems with Prudential?

Mr. **Beck**. None at all. In fact, the evidence is so clear that it was a pure fishing trip because we had already supplied them with 7,500 pages of data just 3 days before they made this extended request.

The **Chairman**. It showed you were at least complying if not more than complying with the rules?

Mr. **Beck**. There is no way that their staff, if they had detailed knowledge, could possibly have evaluated that material in the short time they had it.

Just to make sure that everyone really understands the kind of information they were looking for—they were looking for personnel tapes which would include the spouse's name, which would include payroll deductions for savings bonds, tax deductions, savings in a savings program we have in the company—information that should be totally protected by the privacy laws of this country and had absolutely no relevance to the issue at hand.

The **Chairman**. You indicated that you anticipated a thorough review but not a hostile one. Could you describe what you mean by "hostile"?

Mr. **Beck**. There are so many instances we could use, but perhaps one of the clearest took place on the very first day when the equal opportunity specialist—and I do not know what level that would be in Government—approached one of our executive vice presidents. He just wagged his finger at him in an absolutely belligerent way and said, "This is what you are going to do."

Somehow that does not suggest to me that an agency is coming to a company that has an outstanding record of compliance and affirmative action and is approaching it in a manner designed to develop the right kind of rapport between business and Government.

The **Chairman**. We are constantly told that the extent of paperwork and procedure requirements you have discussed are an exception rather than the rule. Do you agree with that?

Mr. **Beck**. It is impossible for that not to be true.

The **Chairman**. It is impossible for that not to be true or to be true—the exception rather than the rule?

Mr. **Beck**. We have got a couple of double negatives at work here. There is no question in my mind but that that terrible administrative burden is felt by all companies.

There is a lot of conversation along the lines, "You do not have quotas." But for a company to be managed, you have to get down into the bowels of the ship and spread the responsibility among all the organizations. Then the administrative burden just gets associated with that.

The CHAIRMAN. I know that you have indicated that you would be willing to work closely with the committee; and I am going to ask all witnesses—whether they are Government witnesses, business witnesses, small business, or just individuals—to work closely with our committee and our committee staff to come up with solutions which may be able to resolve some of these problems.

I want to personally thank you for taking the time and having the courage to come in here and discuss these problems today.

Senator Nickles?

Senator NICKLES. Thank you, Mr. Chairman.

Mr. Beck, I would like to echo the chairman's compliments for your company's energy and tenacity in not being willing to give up the fight. I think it is very much a fight worth fighting.

I come from a medium-sized company, not quite the same size as Prudential, but likewise we have had problems with this agency as well as the EEOC, and we have felt the burdens of having to fill out affirmative action programs. We have had attorneys come in and say: "This is the program; here is where you sign; and give me so many thousands of dollars." That is "the affirmative action plan."

I have also seen from the inside how very little, if any, it contributes toward actually helping those it is designed to help in the first place.

We end up with a regulatory burden, with a lot of paperwork, with a lot of attorney's fees, et cetera, and to some extent a discriminatory effect on those it was actually trying to help due to the fact of the possible adverse implications that could come about from not wanting to hire "marginal" minority employees, fearing the possible reprisals that come about through OFCCP or EEOC.

For your efforts—past efforts, and continued efforts—in working with this committee and our Labor Subcommittee, we are very appreciative.

Mr. BECK. Senator, thank you very much.

The CHAIRMAN. Senator Hawkins?

Senator HAWKINS. I am exceedingly happy to participate today and, like you, wish we could get our chairman to be emotional about something he feels keenly about. [Laughter.]

Mr. BECK. I appreciate the depth of the intensity of his feelings.

Senator HAWKINS. What rationale did the OFCCP give you for needing your computer tapes without any deletions made for the confidential material?

Mr. BECK. None at all.

Senator HAWKINS. Did you ask for a rationale?

Mr. BECK. Yes, we did. I would like Mr. Schnebly to answer that.

Mr. SCHNEBLY. Senator, they took the position that they were entitled to computerized data as contrasted to manually prepared employee information. They would not admit that they wanted the computer tape because they could more easily manipulate the employee information in a statistical sense in order to develop so-called affected classes.

The CHAIRMAN. In other words, you are talking about the effects test versus an intent test?

Mr. SCHNEBLY. Yes.

The CHAIRMAN. Excuse me, Senator Hawkins—if I may?

Senator HAWKINS. Is he sworn in? [Laughter.]

The CHAIRMAN. With your permission—in other words, they could not prove any intent to discriminate. In fact, to the contrary, they would have to agree—at least, the way you are expressing it—that you had done a great deal to try and help minorities and women.

Mr. SCHNEBLY. Yes.

The CHAIRMAN. So what they then did is turn to what is called a statistics test, or the effects test, where there is no need to show any intent to discriminate, and try to turn to that by using the computer tapes in order to be able to prove that which they could not otherwise prove.

Mr. SCHNEBLY. Yes. As Mr. Beck indicated in his statement, there is reason to believe that the agency had predetermined that they were going to identify affected classes on which to base their claims. This was the approach they used.

Senator HAWKINS. You stated that Prudential has spent $1.5 million so far on this compliance review and spends an estimated $5 million annually on its Federal contract compliance program. Does that amount reflect your total cost for programs designed to assist and encourage minorities or just the cost associated with paperwork and redtape?

Mr. BECK. That represents the hard costs associated with the program. That does not include all of the other efforts that we are involved in, in terms of upgrading personnel, training people—the kind of things that we would do anyway but do have a particular benefit for minorities who need special attention and training and for women in order to try to encourage them to want to be promoted rather than staying at their previous level.

So there are a lot of soft costs which we have decided not to try to use because they are much harder numbers to prove, but those are all hard costs.

Senator HAWKINS. Thank you.

Mr. BECK. Senator, may I make one last point?

The CHAIRMAN. You surely may.

Mr. BECK. We have recommended a positive approach in a general sense, but we have also recommended an approach that to us has great potential, and that is to reward the companies that do a good job—give them an E flag for excellence, or something similar to that, as we have done with the savings bond program. Give them relief from the harassment of the detailed administrative reports. If the broad global numbers are good, there just is no way that that company can be doing something that is in conflict with affirmative action.

Why not recognize the organizations that do that kind of job and relieve them of all the detailed reporting? I believe that more people in this Nation respond to that kind of a positive opportunity for benefits than respond to just being beaten over the head.

The CHAIRMAN. That is a very interesting set of comments.

It would be wonderful to change the name to "positive action" from "affirmative action". Maybe we ought to start talking about that—so that we really do solve these problems rather than just give them lipservice. People like the concept but do not care how it is implemented as long as they can see the bureaucracy growing, and I am sick of the bureacracy growing, especially when it oppresses rather than helps.

I hesitate to tell you how many people have complained about this particular set of bureaucracies, but thank you for coming. We really appreciate it.

Mr. BECK. Thank you for giving us the opportunity to tell our story.

The CHAIRMAN. Without objection, your prepared statement will be included in the record at this point.

[The prepared statement of Mr. Beck follows:]

STATEMENT

OF

ROBERT A. BECK, CHAIRMAN AND CHIEF EXECUTIVE OFFICER

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

PREPARED FOR THE

SENATE LABOR AND HUMAN RESOURCES COMMITTEE

FOR

HEARINGS HELD ON

JULY 29 AND 30, 1981

JULY 29, 1981

STATEMENT TO THE U.S. SENATE LABOR AND HUMAN RESOURCES COMMITTEE BY ROBERT A. BECK OF THE PRUDENTIAL INSURANCE COMPANY

JULY 29, 1981

Thank you, Mr. Chairman, and good morning to all.

My name is Robert A. Beck and I am Chairman and Chief Executive Officer of The Prudential Insurance Company. It is a pleasure to appear before you at this Congressional oversight hearing on the regulatory process, a review activity which is both appropriate and overdue. Affirmative action and equal opportunity is a subject which receives special attention in Prudential -- one in which we have a good deal of experience. Some of that has been rewarding -- some has not; and that's why I appreciate the opportunity to tell you the Prudential story. It is a graphic illustration of over-reaction and irresponsibility in the regulatory process.

Prudential is a federal government contractor. We underwrite major group insurance programs covering federal employees and their families. We administer the Servicemen's Group Life Insurance programs as well as Medicare benefits for Social Security recipients in New Jersey, North Carolina, and Georgia. Our association with these programs not only contributes to the financial security of their participants, but assists the federal government in providing important social services.

Just a year ago, the then Secretary of Labor approved the recommendation of the Office of Federal Contract Compliance Programs and signed an Order to debar Prudential from those federal contracts. Had Prudential not instituted a court action which blocked that debarment order, think what would have resulted:

- It would have required renegotiation of group insurance contracts on more than 200,000 federal employees with insurance companies willing and able to provide similar benefits.
- The Veterans Administration would have had to select a new administrator for the Servicemen's Group Life Insurance program, which involves more than 3 and 1/2 million participants, $73 billion of insurance, and coordination with about 400 participating insurance companies.
- Medicare benefits for two million recipients in three states would have been interrupted. To give you a better idea of the extent of our responsibility in this one activity, last year it involved over 12 million claims totaling $866 million in benefits.
- The jobs of more than 1,300 Prudential employees, many of whom are either minorities or women, would have been jeopardized.

One must wonder whether there was any consideration whatever of the impact of such drastic action.

What did Prudential do to deserve such punitive action? OFCCP made no findings of discrimination; there was no hint that we failed to meet our goals. It was simply a disagreement over the scope of discovery. OFCCP was on a fishing expedition. They wanted far more information than they needed -- far more than they had staff resources to review -- and much of what they sought was of a confidential nature.

In order that you may better appreciate the uselessness of all that, let me place it in its proper framework.

More than 50 million people have a stake in Prudential. Through our individual and group life, health and pension insurance products we provide financial security for millions of families. More than 125,000 businesses rely on our group security and employee benefits programs. We are one of the largest investment managers in America. We manage pension funds for more than 3,000 clients -- companies of all sizes, labor-management pension programs, business employee retirement systems, and so on. For business and industry we are an important source of capital, pumping billions of dollars into the economy through loans to businesses and investments in real estate developments. We furnish employment opportunity for tens of thousands and contribute to the prosperity of hundreds of communities throughout the country.

At year-end 1980 we had a total staff of 69,000 employees assigned to over 1,500 administrative, claim, investment and sales offices. We have affirmative action programs covering each of those 1,500 offices.

Since the beginning of the Executive Order program in the mid-1960's, hundreds of Prudential facilities have been the subject of compliance reviews, and all have been satisfactorily concluded. That fact is evidence not only of our commitment to the objectives of the program, but also the spirit of cooperation with which we have approached the agency's obligation to monitor our progress.

In 1975 an extensive compliance review of Prudential's corporate headquarters and lengthy discussions with government officials which followed -- discussions in which I personally participated -- resulted in a Conciliation Agreement between Prudential and the Department of Labor which covered changes in our affirmative action programs and resolved all issues relating to affirmative action prior to 1976.

It is against this backdrop that the agency commenced a compliance review unique as to its scope, intensity and character. In May, 1979 we were notified OFCCP would conduct a single compliance review of 99 Prudential facilities in New Jersey and metropolitan New York, where some 14,000 employees are located. As a high visibility company in a targeted industry, we anticipated a thorough review, but not a hostile one.

Less than a week after we had organized and submitted over 7,500 pages of requested information, including 99 affirmative action programs, we received written demand for any and all computer tapes containing personnel information or data. Our computer people determined it would have been necessary to review 2,600 reels of computerized data just to determine if that material fell within the scope of the government's request.

Shortly afterwards, representatives of the Labor Department advised us their investigation would be conducted without regard to the terms of the Conciliation Agreement which I referred to earlier. In other words, the OFCCP was taking the position that the Conciliation Agreement, a binding commitment which was the culmination of extended good faith bargaining, was now considered a nullity. In the blink of an eye, they had repudiated their own agreement.

During the two years that were to follow, OFCCP demands for employee data and information on personnel practices have far exceeded even the most cavalier interpretation of relevance. For two years, detailed investigations of virtually every employment practice and every personnel transaction have been pursued by the agency with suspicion and doubt.

In spite of the fact we questioned the need for or relevance of computerized material, we offered to provide to the OFCCP computer tapes with deletions of confidential information which, if released, would compromise the privacy rights of our employees. The agency said that offer was unacceptable and indicated enforcement proceedings would be commenced.

After a delay of six months, during which the government made no effort whatever to seek an amicable resolution, OFCCP filed an administrative complaint under so-called expedited hearing rules. An ambiguous determination by an Administrative Law Judge led to a Sunday evening Order of the then Secretary of Labor debarring Prudential from federal contracts. When the Labor Department announced its action against Prudential, it did so at a press conference in Washington at 10 o'clock the following morning which, of course, is ideal for the television networks. We learned of the announcement only when we began to receive telephone calls from reporters.

To contest an administrative determination which we felt was not only arbitrary and capricious, but which appeared to be orchestrated even before commencement of the review, it was necessary to seek relief in the U.S. District Court. The subsequent court-assisted resolution of the case preserved the privacy rights of our employees. It forced the Labor Department to live up to the terms of the Conciliation Agreement. While we proved that there are limits to the demands government agencies can impose, that should not have been necessary.

The Birmingham Post-Herald pointed out that Prudential had the resources and willingness to fight for its rights. What would have happened, the newspaper asked, to a small company exposed to the federal juggernaut?

Our national affinity for conflict and confrontation is self-destructive. When Judge Stern signed the Order resolving our dispute with the Labor Department he said, "I would urge the government not to impose the most Draconian measures, measures which can have substantial impact on totally innocent people... It is a terrible thing to have to fear one's own government."

Government regulators must begin to view their roles differently. And, of course, business in turn must be willing to recognize the legitimate interests of government and must be willing to cooperate with it.

What is the net result of this confrontation with the Labor Department which is now in its third year -- with no end in sight? So far Prudential has invested more than $1.5 million on this single compliance review. Many of our normal business activities have been disrupted. The adverse publicity resulting from the attempted debarment provoked anxiety and doubt in the minds of our policyholders. The Labor Department has gained little beyond what we offered when they first requested computer tapes. Not one substantive deficiency has been brought to our attention. Most important of all, this entire process has not provided a single member of a protected class with new employment.

We have estimated that Prudential's costs incurred in connection with the Federal Contract Compliance Program exceeds $5 million annually. This figure is based on estimates by our management of the additional costs that are a direct result of our affirmative action programs which would not have otherwise been incurred in the normal conduct of business. It has been estimated that the annual cost of compliance for all federal contractors exceeds $1 billion annually.

In fiscal year 1980 OFCCP spent almost $32 million on compliance reviews in which there was no finding of discrimination. Add to that another $40 million in contractor costs for reviews in which there was no finding of discrimination. Think what $70 million would do if put to work productively. Cost figures such as these lead to but one conclusion -- there must be a better way.

The Labor Department is searching for a better way. However, its proposals for modification of existing regulations represent little more than tinkering with the regulatory structure. While some of the amendments make the program less burdensome, the Department's proposals will not make the program more effective, nor will they end the regulatory overlap between the EEOC and the OFCCP, its most burdensome aspect.

We believe the purpose of affirmative action is to make something happen -- it means more than business as usual. It is evidenced by positive efforts to insure equality of treatment or to assist and encourage minorities and women in taking advantage of job opportunities. The agency's insistence on rigid adherence to fictional availabilities is often counter-productive and forces contractors to play the numbers game. The existing program fails to address the fundamental issue of how to effectively increase the supply of minorities and women with necessary skills to fill existing job opportunities.

Administration of the program lacks provision for meaningful voluntary compliance. Enforcement is marked by an adversarial atmosphere of threat and intimidation. Moreover, the agency seems to operate on the presumption that constant and rigorous regulation of a few large companies will cause the remainder of the contractor community to fall into line. It is ironic that those employers with the best track records in affirmative action, such as General Electric, Sears, A.T.&T., General Motors and, yes, Prudential, are the targets of continuing compliance enforcement. The inadequacy of selective enforcement is illustrated by the fact that each year fewer than 1% of all federal contractors are reviewed, and often these are the same companies reviewed in previous years.

It is time to step back and re-examine an Executive Order program which has been universally criticized, to draw on its strengths and eliminate its weaknesses, and that cannot be accomplished with bandaids.

This Administration has a golden opportunity to redirect the regulation of employment policies of federal contractors -- to mandate a positive approach to affirmative action rather than a negative one. I believe it is possible for government and private enterprise to launch a cooperative effort which allows for innovation and utilization of talent within the private sector. In the past decade, social responsibility has been emphasized by American industry. A more direct focus on affirmative action is a natural extension of that philosophy. With the enlightened guidance of government we can mobilize the business community, labor and private interest groups to address these problems. Let us marshall our resources and invest them wisely in programs which will expedite the training and placement of minorities and women in marketable skills and jobs. The resources that we have heretofore spent on unnecessary reporting requirements, bureaucratic duplication, anc preoccupation with unrealistic quotas could be better spent on programs where the action is indeed affirmative.

An Executive Order which corrects current deficiencies and presents a new and innovative approach to affirmative action, one which incorporates significant employer incentives for voluntary compliance and directs utilization of the OFCCP's resources in a positive fashion, has the potential for producing a program which lives up to its promise.

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ATTACHMENT I

Affirmative Action at Prudential

A Summary

In his first major statement as Chief Executive Officer at the Prudential Officer's Council in October, 1978, Bob Beck gave considerable attention to equal employment opportunity and affirmative action.

In his list of major principles and objectives for Prudential, Mr. Beck included the following:

> "IN REGARD TO OUR EMPLOYEES AND AGENTS:
>
> to promote equal employment opportunities by using effective affirmative action programs throughout Prudential."

In assessing the business environment, he said:

> "Of all the trends we have surveyed, the impact of women and minorities on how we do business in the clearest and most unambiguous. Our choices are equally clear.
>
> - we can change course and treat women and minorities as employment and marketing problems. Dig our heels in and make concessions under pressure from outside groups, government, ultimately, inside groups.
> - or, we can continue to treat women and minorities as employment and marketing opportunities. Keep using our management skills to enrich the executive, managerial, and field sales ranks by tapping broader pools of talent and developing specialized products and services for those market segments.
>
> Given these options, we have no difficulty reaching a decision."

Later in his speech, he spoke in more detail about equal employment opportunity.

> "This subject is not as new as many may think. As far back as the forties, Prudential had several women Managers and Associate General Managers. We were known in Newark as one of the few companies that hired blacks and other minorities. In 1949, we eliminated separate salary progression scales for men and women; this was more than fifteen years before the law required it. By the fifties,

> we are actively seeking minority college graduates and by 1962, we had eliminated the practice of allowing line management to designate whether it wanted a male or female college graduate. While we do not claim we were a pioneer in bringing about social change, we were well ahead of most corporations in just about every area in which we operate.
>
> In 1965, Orville Beal signed our 'Plans for Progress' agreement and we joined the partnership of government and business to help eliminate discrimination. It was recognized that a simple non-discrimination policy did not go far enough in remedying the effects of discrimination and injustice in the country over a period of many years. Implicit in the Plans for Progress approach was the recognition that affirmative action had to be taken to help disadvantaged groups and that the Government alone could not solve all of the social problems facing America."

Mr. Beck then pointed out that our voluntary efforts were well underway when Title VII of the Civil Rights Act and Executive Order 11246, brought the government into our affairs as a much more active partner. While he indicated that, in many respects the Government had been far from effective in dealing with this problem, the basic requirements that corporations have affirmative action programs with goals and timetables and that they report results to the Government periodically, certainly made sense. Mr. Beck then went on to show that Prudential had made very significant progress during the years since Title VII and Executive Order 11246. He pointed out that in 1966, the first year for which we have statistics, we had 45 women and 12 minorities at Associate Manager and Manager ranks. Today, we have 1298 women and 344 minorities in these positions. In District and Ordinary Agencies in 1966, there were 96 women and 731 minorities. Today, we have 1480 women District Agents and 589 women Special Agents, as well as 2418 minority Agents in the two marketing forces. Of our 55,382 employees in 1966, 2723 (4.9%) were minorities. Of the over 66,000 employees of Prudential and its subsidiaries in the United States in 1980, about 10,000 (15%) are minorities.*

In his reaction to these statistics, Mr. Beck concluded:

> "These numbers didn't just happen; they represent the commitment and hard work of you and all of your associates. There is one question that remains, however, 'have we done enough?' I think not.
>
> I believe that more can and should be done. At our present rate of progress, we are still many, many, years away from the day when we will have an appropriate representation for women and minorities in our management and executive ranks. . .

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*these statistics have been updated through fourth quarter, 1980.

> I look forward to the day -- hopefully during my lifetime -- when we can fold up all of our affirmative action activities because the job will be done. . .
>
> In the meantime, I want you to know that I am strongly committed to an aggressive policy of affirmative action, and I will personally follow your efforts in this area."

These numbers definitely did not "just happen". Prudential's management staff has adopted a variety of measures over the years to carry out our affirmative action commitments. Some of the more important ones are:

AFFIRMATIVE ACTION PLANS

Since the late 1960s, each Regional Home Office (RHO), field office, and subsidiary has prepared an annual affirmative action plan (AAP) outlining its short-range and long-range goals for achieving representative numbers of minorities and women among its employees. Supporting the RHO AAPs, we introduced in 1974 individual division action plans, also prepared on an annual basis, in which each manager specifies the actions he or she plans to take with regard to hiring, developing, and/or promoting qualified minority and female candidates in the division. As a further step, in some RHOs, department heads and managers list EEO and affirmative action results in their performance objectives.

ACCELERATED GOALS

An additional effort, called the Affirmative Action Goals Program, ("accelerated goals") was begun in 1978 for Associate Manager rank through Functional Vice President. It was the result of Prudential's concern that affirmative action projections for these ranks be realized in a reasonable time frame. RHO officers were asked by Chairman Beck to advance their 1982 affirmative action objectives to 1979. A similar program was developed for 1980 and a very aggressive program is in place for 1981.

This accelerated effort has been given high priority by our Executive Office and is closely monitored on a quarterly basis through statistical reports and hihg-level meetings. To date, results have been very successful.

INDIVIDUAL DEVELOPMENT GUIDELINES

The Individual Development Guideline (IDG) process, which began in the 1970s, encourages individual developmental planning for all employees and provides the Company with an inventory of individuals having advancement potential. Currently, the program applies to level 05 through Functional Vice President. Managers predict when each employee will be eligible for promotion and indicate whether a second or third promotion can be expected within five years. IDGs have been extremely useful in identifying high-potential minorities and women for affirmative action planning.

EXTERNAL AND INTERNAL CANDIDATE SEARCHES

Corporate Personnel/RHO interaction on the recruitment of top candidates for positions at Manager rank and above has been instituted over the past two years. This interaction provides the whole Company with the services of two national search firms -- Xavier Associates of Dedham, Massachusetts for minority candidates, and Boyden/Management Woman, Inc. of Greenwich, Connecticut for women. Another benefit of this interaction is that a top applicant for whom one RHO may not have a position can be exposed to Company-wide opportunities.

This Corporate Personnel/RHO interaction has also been utilized to locate minority and female candidates for transfer or promotion among current employees. A very positive result is that an affirmative action communications network has been built between key managers throughout the U. S. and Corporate Personnel.

JOB POSTING

Job posting, which opens up job opportunities to all qualified employees, was extended to all RHOs in 1979 and in most office, includes jobs up to Associate Manager (in CORP and EHO to Manager rank). This program, though not solely established for affirmative action purposes has contributed to it in that women and minorities are participating in representative numbers.

In September, 1980, the Agent's Job Availability Program was instituted for all locations which participate in job posting. A notice describing the Agent position and how to obtain further information is permanently placed on the same bulletin boards as the job posting notices. Personnel Consultants arrange for interviews with Sales Management for all interested people. The Program is aimed at increasing the number of female agents by encouraging home office people to consider careers as agents.

COLLEGE RECRUITING

College hiring has played a major role in our affirmative action efforts. As an example, women have represented more than 45% of our college hires during the last six years and minority representation has been over 18%. This latter number is much higher than the rate that our colleges are graduating minority students.

Prudential directly recruits minority MBA students who have received fellowships from COGME (Council for Opportunity in Graduate Management Education). COGME is an association which helps fund minority graduate education in the most prestigious business schools and is supported by large corporations like Prudential (Prudential Foundation). In addition to on-campus recruiting, a number of students have been invited to Newark for more extensive interviewing.

HANDICAPPED PERSONS

Affirmative action for handicapped persons became a legal requirement for contractors with the federal government in 1973. (Goals and timetables are not required.) Prudential had a special program for employment of the handicapped many years before that date, and when the new federal law and regulations were issued, the Company easily adopted their requirements. Prudential has in place an ongoing invitation to handicapped applicants and employees to identify themselves for affirmative action purposes, as required by federal guidelines. Over the years, another noteworthy aspect of the handicapped program has been the effort to provide reasonable accommodations for handicapped employees who might otherwise be hindered from working. These accommodations have included, among many, a special magnifier for a legally blind typist, employing "signers" to provide simultaneous sign language interpretation during the programmer training class, and reviewing all of an RHOs job requirements to identify career paths for persons with specific handicap limitations. Prudential's efforts at affirmative action have gone well beyond the scope of employment. We play a major role in the community in promoting the welfare of handicapped persons. As 1981 has been proclaimed United Nations International Year of Disabled Persons, a review of a sample of our ongoing handicapped programs is appropriate:

- PruPac has a very active program of rehabilitation for those insured by us in the states of New Jersey, Pennsylvania, and Michigan, since these states contain unlimited medical benefits in their no-fault laws. Rehabilitation is also pursued where feasible in other states. Our efforts carried out through our own Rehabilitation Coordinators, utilize independent nurses, rehabilitation hospitals, vocational counselors, and other providers in the field of rehabilitation with the aim of restoring the catastrophically injured back to work or home. Modification of a job site, vans and the home are used as alternatives to permanent nursing home care. PruPac has found rehabilitation not only rewarding to those who suffer severe injury, but our active participation in the rehabilitation of the injured individual results in a cost effective program saving many valuable claim dollars.

- Company representatives are active on the advisory board of the New Jersey Rehabilitation Hospital and other rehabilitation centers.

- For many years, Prudential has participated in the Hand-in-Hand festival for mentally retarded people. The purpose of the festival is to bring some 5,000 mentally retarded and handicapped citizens from all over New Jersey out for a day of fun and recreation. It takes some 15,000 volunteers to make the festival work. Each guest is paired off with a volunteer "friend" for the day. The additional volunteers run the games, activities, and support services featured at the festival, including working on homemade prizes, flea markets, and baking cupcakes.

- Prudential has contributed to the publication of Rehabilitation Nursing Care Curriculum, a training manual which will serve as a basis for the certification process in rehabilitation nursing.
- Prudential has also contributed to the National Easter Seal Society's "Design for Accessibility" project, a training program which helps architects, builders, and others meet the environment needs of disabled and elderly persons.

OUTSIDE PUBLICITY FOR PRUDENTIAL'S AFFIRMATIVE ACTION AND EEO ACTIVITIES

Prudential has for some years included affirmative action progress in its annual report. The 1980 Annual Report states the following:

> "The Company continued its affirmative action efforts centering again on increasing the representation of women and minorities in management and executive positions. Most of the objectives in the 1980 accelerated goals program were met or surpassed. In the Home Offices, there was an 18.0% increase for all women in Associate Manager through Functional Vice President positions and a 16.3% increase for all minorities in these positions. Similarly ambitious goals have been established for 1981.
>
> The Company and its subsidiaries hired 3636 minority group members in the United States for Home Office and field positions, representing 20% of all new employees. Also Company-wide, there were 626 college graduates hired in 1980; 60% were women, up from 57.7% in 1979, while minority college graduate hires were at 21.1%, up from 20.5% the prior year. At year-end 1980, minority staff totaled 10,083, an increase of 270 employees over 1979."

In addition, Prudential states its EEO commitment in employment advertising, and selects multi-ethnic, male and female images in its product advertising.

AA AND EEO TRAINING FOR MANAGEMENT

An "Affirmative Management" training program was designed to provide supervisors and managers with the legal and practical information they needed to carry out their EEO and affirmative action responsibilities effectively. This program, introduced in 1978, superceded a variety of programs previously used by individual RHOs, and provided more training consistency. In 1979, every RHO began offering Affirmative Management, and several have already given the program to all their eligible employees.

CAREER DEVELOPMENT

A "Women in Management" program was started in October, 1976, to develop the management skills and career awareness of high-potential women at levels 09 through Associate Manager. Since then, approximately 2,200 women Company-wide have been through the two-day program. Some RHOs have recently broadened the audience for this type of career development training by going co-ed, and adding high-potential male as well as female employees. Separate career development training for high-potential minority employees had been attempted in the past as well, but attendees indicated that they preferred to be trained in a more realistic setting alongside their non-minority colleagues. Also, a Career Development handbook for all employees Levels 01 through 12 was published in early 1981.

SUPPORT FOR MINORITY EDUCATIONAL INSTITUTIONS

Prudential has developed relationships with a number of minority institutions of higher education, including Hampton Institute, Howard University, and Johnson C. Smith University. The Hampton summer intern program has since 1976 placed Hampton juniors (usually four) at the Corporate Office for ten weeks every summer in meaningful positions. Several of the former interns have returned for permanent employment after graduation. Prudential has also donated $4000 to $5000 to Hampton each year since 1974 and is a member of the Hampton cluster program for business input into curriculum and career planning.

Since 1978, the Prudential Foundation has contributed $10,000 a year to Howard's Center for Insurance Education to support a concentration in insurance in the Backelor of Business Adminstration Program. This concentration in insurance is one of the first of its kind at a minority institution.

In 1980, Prudential Foundation donated $14,100 to Johnson C. Smith University. Part of the grant, $6000, will be used to make improvements in the Computer Science Department. The rest of the funds are used to provide scholarships to six students who are interested in programming. The students are selected by Prudential and receive $150 a month during the school term.

Prudential has also been a substantial supporter of the United Negro College Fund for many years. For example, Prudential Foundation contributed $56,000 in general support grants for fiscal 1980 and $60,000 has been budgeted for 1981. In addition, Chairman Beck is co-chairperson of the Fund's capital resources development program and heads up the insurance giving drive. In 1979, Prudential pledged $400,000 payable in five annual installments of $80,000 for this development program.

Other notable 1980 Prudential contributions to minority higher educational assistance includes $15,000 in scholarship aid to the Carnegie Mellon Minority Actuarial Program, $5000 to the Consortium for Graduate Study in Management, and $7500 to the Council for Opportunity in Graduate Management Education (COGME). Prudential has also donated over $88,000 to minority educational institutions below the college level.

These contributions are part of an extensive list of grants Prudential makes each year to minority educational organizations.

MINORITY PURCHASING PROGRAM

The importance of increasing purchases from minority vendors was also recognized by Mr. Beck in his 1978 Officers' Council statement. He asked the Public Affairs Department to monitor performance Company-wide. In 1979, the Purchasing Department's minority purchasing program was supplemented by a program for purchases made through the general expense voucher. Statistics for both are tabulated by Public Affairs.

As an example of the increased emphasis in this area, between 1976 and 1978 minority purchasing via the Purchasing Department grew from $583,000 to $2,000,000 while total Purchasing Department figures increased from $70,000,000 to $100,000,000.

As emphasis shifted from the Purchasing Department to Company-wide purchasing (including construction contracts, maintenance contracts, etc.), minority purchasing grew to $7.9 million in 1979 and $10.7 million as of third quarter 1980. Year-end 1980 figures are projected at $13 million.

Prudential is a member of the National Minority Supplier Development Council (NMSDC). A Prudential vice president is on its board. In October of 1980, Dave Sherwood served as general chairman of the NMSDC annual conference.

THE MINORITY BANKING PROGRAM

Prudential's Minority Banking Program began in 1968 with the opening of non-interest bearing deposit accounts in all 22 U. S. minority banks. The following year, authority was granted to add matching Certificates of Deposit in minority banks.

In 1972, savings and loan associations were added.

Our present program provided for the maintenance of $25,000 in non-interest-bearing demand deposit accounts in all minority banks and $20,000 in interest-bearing accounts in all minority savings and loan associations. As a bank grows and prospers, a matching Certificate of Deposit is added. The rate of interest paid on this deposit is usually less than would be available in the regular course of short-term investment. Where opportunity permits, the accounts in minority banks are converted to actively-used operational accounts. Three such accounts are presently operational.

The overall Program now consists of:

a. non-interest bearing deposits totaling $2,570,000 in 102 banks

b. interest bearing Certificates of Deposit totaling $1,575,000 in 62 banks

c. interest bearing savings accounts of $1,460,000 in 73 savings and loan associations.

Additionally, $100,000,000 of the Company's federal tax payments are made through minority banks. Modest benefit in obtained from the sums to the extent that they may be invested for one day prior to remittance to the U. S. Treasury Department.

SOCIALLY ORIENTED COMMUNITY PROJECTS

From the many projects Prudential has aided, here are two examples:

- Prudential has assisted Newark's Mount Pleasant Community Development Corporation (MPCDC) in rehabilitating multi-family buildings (approximately 26 units) for cooperative ownership. At the same time, this project is providing local residents with training in the construction trades.
- In 1979, Prudential in partnership with a local planning and development company, initiated a rehabilitation project involving what is now some 600 housing units in Newark's Central Ward. Prudential is funding the project with up to $1 million.

SUMMARY

The employment and upward mobility of minorities and women and the handicapped has been a sincere concern of the Prudential for many years. This concern has predated and has gone beyond the requirements of the various laws and regulations and has even extended into areas outside of the employment process. Much has been done and much more remains to be done.

What has been accomplished has been the direct result of Prudential's senior Executive Officer's beliefs in the social responsibility of a large corporation and the implementation efforts of the Company's management staff. What will be accomplished as we enter the 1980s will be the result of a continuation of these commitments and efforts of the Prudential management team.

March, 1981

The Chairman. Our second witness today will be Mr. Jose Cano, national chairman of the American GI Forum of the United States, one of the oldest and most pretigious Hispanic organizations in this country.

Mr. Cano, we are happy to have you here with us today.

STATEMENT OF JOSE R. CANO, NATIONAL CHAIRMAN, AMERICAN GI FORUM OF THE UNITED STATES

Mr. Cano. Good morning, Mr. Chairman and distinguished members of the Committee on Labor and Human Resources.

I am Jose Cano, national chairman of the American GI Forum of the United States, the Nation's oldest and largest Hispanic veterans and family organization.

May I begin by extending my appreciation for the opportunity to be with you today to provide an Hispanic perspective on the subject of improving the Executive Order 11246?

For 33 years the organization I represent has had as its principal goal the realization of full equality of opportunity for the Hispanic-American within all facets of American life. Thus the issue of affirmative action and particularly its handling at the Federal level by Government policymakers is of critical concern to our members as both these factors impact heavily on our growing Hispanic population.

From the outset let me clarify our firm commitment within the Hispanic community to the concept of affirmative action. That is to say that we within the Hispanic population understand there to be a substantial and ongoing need to combat discrimination against our people in the job market, at the workplace, and in many areas where our people endeavor, as other Americans, yet too often without the same levels of success due to persistent obstacles that our people confront as a result of ethnic and linguistic distinctions.

However, having clarified our commitment to the concept of affirmative action, I would like to speak this morning on the lack of effectiveness that we in the Hispanic community are presently able to attribute to the current program established by Executive Order 11246 which aims at insuring equal hiring practices within firms contracting through the Federal Government.

We in the Hispanic community understand the intent of the Executive order to have been a good one—basically, to create a means of insuring the increased hiring of qualified Hispanic and other minority Americans throughout all levels of the American work force. Yet unfortunately this has not been the effect that Executive Order 11246 has had.

Rather than focusing on the actual progress of firms in their hiring of minorities and women the current program emphasizes compliance procedures which serve mainly to lock firms into an entangling bureaucratic reporting process.

The result is, first, that the extensive procedures required cause covered employers to devote a majority of time complying with procedure rather than engaging in meaningful efforts to increase minority and female representation within the work force.

Second, and more fundamentally, the process builds in employer opposition to the program.

A critical component of the current Office of Federal Contract Compliance Programs—OFCCP—serving to imbalance the intended emphasis of Executive Order 11246 is the use of inflexible and futuristic affirmative action plans rather than evaluating past performance on personnel hiring practices.

In fact, on the whole, employers that actually improve the representation of minorities and women within their work force and throughout their personnel actions are no less subject to the Office of Federal Contract Compliance Programs' voluminous documentation requirements consisting of complex analysis of applicant flow, progression line charts, progression sequences and availability, among other things.

This is particularly difficult to justify where oftentimes such employers are cited for technical deficiencies such as posters, EEO statements, et cetera, causing the employer to be placed under a letter of commitment or some other requirement imposing additional paperwork on the employer.

Not surprisingly, these types of procedures break down the incentive for the employer to continue efforts that have resulted in the adequate representation of minorities and women in their work force.

Too often under the program the incentive for the employer to emphasize minority and female hiring and upward mobility is broken down even further by way of the Office of Federal Contract Compliance Programs' misguided assumption of sanctioning powers.

Processing of individual complaints of alleged employer discrimination, even where there are class implications, does not coincide with the overall mission of the Office of Federal Contract Compliance Programs.

This responsibility falls more logically within the purview of the Equal Employment Opportunity Commission. Still, OFCCP continues to operate within the realm of processing complaints of employment discrimination.

This results not only in a duplication of tasks vis-a-vis the EEOC but also in an unnecessary expenditure of resources which otherwise could be used more constructively toward realizing the intended ends of Executive Order 11246.

In effect, OFCCP has placed a greater emphasis on sanctioning employers for noncompliance on procedural factors rather than for their lack of adequate minority and female hiring.

Suffice it to say that we in the Hispanic community are not pleased with the current direction of the Executive Order 11246 program where our prospects for equal opportunity are concerned.

We in the American GI Forum in particular are convinced that a redirection of emphasis and approach is necessary to guide the program to its originally intended ends—the bottom line, as we call it—of increasing and enhancing minority and female representation in the work force.

Therefore we submit that the Executive Order 11246 program can be improved in the following way:

Briefly, the Executive Order 11246 contract compliance program should emphasize the employment of minorities and women and their representation in postemployment personnel actions rather than the present emphasis on procedural compliance.

Under this bottom-line concept the employer will be free to actually seek out minorities and women without having to be bound to routine and traditional procedures dictated by the Government and which have not produced the desired results.

A major effort of OFCCP should be to develop an ongoing and "upon request" technical assistance program that would promote compliance with the Executive order and provide employers with the tools to achieve that compliance. Industry and the special interest community should be a viable part of the technical assistance program.

As opposed to the past practices of technical assistance programs which have been directed to showing employers how to compute mathematical gyrations and have served only to fill the pockets of consulting firms and attorneys, the technical assistance programs we have in mind would be directed to showing employers ways to meet the bottom-line concept.

Voluntary industrywide approaches, including recruiting techniques, scholarships, upward mobility, and other programs, would be researched and promoted by OFCCP under their technical assistance programs. Industry would be guided toward compliance in a voluntary, creative, and constructive manner.

Reporting requirements routinely required of employers covered by the Executive order program, including the monthly employment utilization report—CC-257—should be eliminated.

Reporting requirements instead should be used on a selective basis and as a tool to prioritize employers for desk audits and onsite reviews.

In addition, reporting requirements could be used as a negative incentive whereby employers found to be deficient would be placed under a periodic reporting requirement to assess correction of those deficiencies. On the other hand, contractors that are in compliance with the Executive order should be free from such requirements.

The voluminous documentation required of employers to demonstrate compliance should be reduced.

The bottom-line concept would focus attention on minority/female representation in the employer's work force and in postemployment programs including all personnel actions.

Complex analysis of applicant flow, progression line charts, progression sequences, availability, and other documentation should not be upon the employer to provide. Instead, the basic data needed from which to determine compliance should be identified by OFCCP and made known to the employer through its technical assistance program.

Employers should be reminded that some degree of self-analysis has been proven valuable in achieving the bottom line. Nevertheless, the employers should be the ones to determine the degree and method of self-analysis necessary for their particular firm.

Legislation giving the EEOC responsibility for processing all complaints alleging discrimination in employment on the basis of race, color, sex, religion, national origin, age, and handicap should be introduced.

Processing of individual complaints, even where there are class implications, does not coincide with the overall mission of the Office of Federal Contract Compliance Programs.

Graduated sanctions to coincide with the degree of noncompliance must be developed and facilitated through the expedited adjudicatory process.

Sanctions could run from the minimum—letter to employer outlining minor deficiencies and requesting correction—to imposing a period reporting requirement, to full debarment.

In any event, sanctions should be held only to cases of clear noncompliance with respect to the appropriate hiring and promotion of minorities and females versus the current emphasis on procedural factors.

We in the GI Forum are firm believers in alternative strategies such as those just outlined emphasizing a more constructive approach to increasing and enhancing minority and female representation in the work force.

Senator, we have presented to you a paper that we believe will promote the interests of the minority Americans and women in this country.

By way of background, I have been involved in the area of Federal contract compliance and affirmative action over the past 9 years. We have done research with contractors and research with people involved in the area of affirmative action, and as a result these are the findings we present to you.

Thank you very much.

The **Chairman**. Thank you, Mr. Cano.

President Reagan and Vice President Bush have challenged us to come up with new solutions to solve these problems, and I think you certainly have met that challenge with some of your suggestions here today.

It is reassuring to me personally to see minority leaders such as yourself step out in front and not only criticize but come up with solutions to some of these problems.

As I indicated earlier, we have to be critics but we have to be loving critics.

I want you to know that other civil rights advocates probably may consider you an outcast with the testimony you have given, but that is not a new role for you; I have heard, and most people in leadership roles are viewed that way from time to time—the people who are willing to stand up and speak their minds.

From your standpoint, I would conclude that your organization takes serious issue with OFCCP's concentration on paperwork.

Are you saying really that if Government compliance officers and corporate EEO specialists were to concentrate on removing discriminatory barriers instead of shuffling paperwork back and forth the fundamental purposes of the Executive order would be addressed?

Mr. **Cano**. Exactly. We take the position that there is too much paperwork and that in fact that Executive Order 11246 has been a law without enforcement. In looking back I do not think anyone can cite an instance of debarment of any firm on letters of "show cause," on petty items, whether it be a poster on a board, or whatever.

We would prefer the concentration on scholarships, on upward mobility programs, and the evaluation on a futuristic type of promotion—in other words, rather than evaluating affirmative action that is based on future performance, that we evaluate the performance of the company in past hiring practices: how many minority candidates were available, whether there were opportunities to select, and whether they were selected—a minimum type of requirement that would be easily met.

The CHAIRMAN. Has OFCCP encouraged employers and groups such as yours to work together to try and solve these problems of discrimination, or has its focus been elsewhere?

Mr. CANO. We have been mainly assisting the OFCCP as a recruitment source. We get the letters of opportunity that might be available with firms that are going to go to hiring searches and things like that—rather from the standpoint of recruitment than any type of technical assistance.

The CHAIRMAN. Do you think it is necessary for OFCCP to investigate contractors against whom no charge of discrimination has been filed?

Mr. CANO. No, sir. I think I have to clarify that point. I think a very simple monitoring system that I have just talked about, evaluating past performance or hiring practices is the most simple form—it is very easily implemented—but not any type of extensive onsite evaluation.

Technical assistance is what we think would be ideal for the firms where, upon request, the OFCCP would assist in providing methods of recruitment or assistance by scholarships, and so on.

The CHAIRMAN. It is my sense that the OFCCP, with its burdensome regulations and adversarial tactics, may now be creating a backlash against minorities. Do you agree or disagree with that?

Mr. CANO. I do not know if it is a backlash. I had an opportunity to meet with one of the largest highway firms which hires contractors in the country, and there seems to be more of a sense of frustration with the type of regulations that are being imposed even though they have done an adequate job in promoting minorities. If you want to call that a backlash—I hope not, because the minorities are not at fault because of the requirements of the Federal Government.

The CHAIRMAN. I agree with you, they are not at fault, but if an agency of the Government creates a backlash against you that is certainly not a good thing to resolve these problems with.

Mr. CANO. Senator, I want to go on record in saying that we are not against affirmative action; we are not against the original intent of the law; we are against the way the law was implemented.

The CHAIRMAN. I do not think anybody is against the original intent of Executive Order 11246; it is the way it has been implemented and the way it has been enforced.

Mr. CANO. Yes.

The CHAIRMAN. Thank you.

Senator Hawkins?

Senator HAWKINS. I take it from your testimony that your experience has shown that the use of quotas—no one likes to call it quotas, but basically that is what it is—has caused resentment among your fellow workers who have perceived the hiring and promotion of minorities as being not based on merit but just on the need of the employer to fill a quota.

Mr. **Cano**. Senator, I do not have an answer on what would be a realistic goal. It is something I think the Congress and the agency has been coping with for a long time.

I heard it mentioned a while ago that the labor statistics that are currently being used as a measure of a goal becomes a quota. I think that is unrealistic because what is available in the labor market is not necessarily the skill that might be available.

However, I do believe that there has to be some sort of target to shoot at, one that would be more realistic.

I do not have the answer. However, I would be willing to work with this committee or anyone else to come up with a solution of what is a realistic approach to a goal rather than a quota.

Certainly I do agree—and I agree with whoever said it a while ago—that the availability in the labor force is not a realistic goal.

In the Hispanic community we have about 3 percent of our graduates of universities coming out who are engineers, yet the labor force statistics for Hispanics is something like 14 or 15 percent. It is unrealistic to expect a firm to have 50 percent while there is only 3 percent availability, so it is an unrealistic type of approach. I agree with you on that.

Senator **Hawkins**. Thank you.

The **Chairman**. Thank you, Senator.

Thank you, Mr. Cano. We appreciate your taking the time from your busy schedule.

Mr. **Cano**. Thank you.

The **Chairman**. Our next witnesses will be a panel made up of the Mechanical Contractors Association: Thelma Stevens Mrazek, director of communications; Frank Salatto, Jr., of the W. G. Cornell Co., Washington, Inc.; and Mrs. Alma Gaghan of Gaghan Plumbing Co.

We are very happy to have you folks with us today, and we look forward to hearing your testimony.

Ms. Mrazek?

STATEMENT OF THELMA STEVENS MRAZEK, DIRECTOR OF COMMUNICATIONS, MECHANICAL CONTRACTORS ASSOCIATION

Ms. **Mrazek**. Thank you very much, Senator.

We very much appreciate the opportunity to be able to express the views of the construction industry this morning.

I would like to point out that we are not representing just mechanical contractors; we are speaking for about 25,000 similar firms. Most of these are small businesses from the electrical, sheetmetal, insulation, roofing, painting, decorating specialty contractors. They have organized into the Associated Specialty Contractors, Inc. Most of them employ union labor.

In the interest of time I would like to just ask that my statement be submitted into the record.

The **Chairman**. Without objection, all the statements will be included after the panel discussion.

Ms. **Mrazek**. I believe you will find that the summary statement will be demonstrated quite extensively by the two contractors who are here.

I would like to introduce Mr. Salatto. He is vice president of the W. G. Cornell Co. of Washington, Inc. He has been very active in the national EEO committee and with a local association here.

The **Chairman**. Mr. Salatto?

STATEMENT OF FRANK SALATTO, JR., VICE PRESIDENT, W. G. CORNELL CO., WASHINGTON, INC.

Mr. **Salatto**. Thank you, Mr. Chairman, for holding these hearings on oversight.

First I would like to state that we are not against affirmative action; we are for affirmative action and, indeed, practice it. We are only against the way it is being implemented by OFCCP. The way it is being implemented adds no jobs; it just adds nonproductive overhead.

I would like to express to you a few of my experiences with OFCCP.

When a contractor is low on a bid and is awarded a job, prior to the award he is given a preaward conference at which there is a review of the affirmative action plan of that company.

At my first such review I was told—this was some 8 or 10 years ago—I was to prepare an affirmative action program for our company, and I was handed an 8-page document. They told me this was a guide which I should follow.

I reviewed it and found a generous duplicity of words and found that I could make a quality program with no need for this duplication of words.

I went back, and I handed in a program which consisted of a page and a half. It was rejected. They told me, waving these eight pages in my face, "We want a long program." I said, "This program does the same as yours; it just uses fewer words;" and they said, "We want a long program."

So I rewrote my program—I did not rewrite my program; I added two pages of words. After adding these two pages of words I took it back, and this was accepted reluctantly by the OFCCP.

The **Chairman**. You did not add another thing to it other than the extra words?

Mr. **Salatto**. Not one thing. I just added a lot of phrases—many words—but the program was precisely the same.

We were then instructed on submitting a monthly manpower utilization report which gives the OFCCP a picture of your EEO posture. When they review this they do not look at the number of individuals one has on one's payroll; they look at the hours.

If for some reason an individual—either because they are sick or on vacation—does not work in that month and the hours numbers do not reach these goals, then you are flagged for audit. If they do not reach them within a given period of, say, 3 months, you definitely will be audited.

In the beginning we were told that if we had difficulty getting minorities for employment we should go outside the union. Indeed, they did not want to hear anything about the fact that we are union contractors.

The **Chairman**. It is pretty difficult for you to go outside the union as union contractors.

Mr. **Salatto**. They are asking you to break the contract you have with another organization to do that.

The **Chairman**. That leads to all kinds of business problems—strikes, et cetera.

Mr. **Salatto**. It could.

Their office said, "Don't worry about the unions. If you hire a minority and you have a problem with the union, come to us; we will take care of it."

One contractor did hire a minority, and the Government could not help him take care of it—indeed, did not help him take care of it—and he had many problems with the union, trying to get this minority employee on a job. He was left to his own devices to correct this.

At one meeting it was requested that we submit a report, and I suggested to the EOS that the report he was requesting was just time-consuming with excess hours and paperwork and that if we did it in another manner we could do it faster and give him the results he wanted.

In front of about 12 people he said, "What is your name? Whom do you work for? Where is your office? I am coming to your office, and if you do not have a minority in your office staff I will cite you."

I was kind of astonished, and I did not know what to do. It never occurred to me that a government employee could or would act in this manner, but the fact is that he did take this tack in front of 12 other contractors.

Several months later we had another contract; we had a preaward meeting. At that time I was advised by the EOS in a very threatening manner—I deemed it as such—"If we want to, we can come in and audit your records." So I said, "Come right ahead; I have nothing to hide; our records are in fine shape."

Three or four months later the threatened audit came about. This was the first time I was subjected to the 117 questions that an EOS asks when they audit one's office. Nowhere in that 117 questions can anybody escape saying no at least once, and if you say no once you have failed the audit.

If you fail the audit you are subject to receiving the boilerplate conciliation agreement. The reason I say "boilerplate" is that they are all the same.

The negotiation part of a conciliation agreement, as far as I am concerned, is that they negotiate how long you want to take to work out the problems.

Prior to this audit I had decided that I was going to document any affirmative action programs or steps that I had taken, just for my own well-being and for the company's well-being. If it ever came up I wanted to be able to say, "This is what I have done."

At the audit I had this file all laid out which documented all these things that I had done. I was showing them off very proudly to the EOS, and she said to me, "Why don't you have a form for this? Why are you using notepaper for these notes?" So instead of being credited for taking affirmative action steps and documenting them I was chastized for not having a formal, structured way of doing it. After this audit we developed about 20 forms to satisfy OFCCP. No jobs were generated with these forms.

The questions and the requirements of OFCCP in their regulations are designed for a company that has a structured growth. They are designed for a General Motors or for a Prudential, if you will; they are not designed for a company with 5 employees or 25 employees, whose employment fluctuates, and which draws their employees from a union pool. They in no way consider the idiosyncracies of the industry.

On May 21, 1979, I attended a meeting at OFCCP in which they were reviewing their new program. Mr. Weldon Rougeau, who was then director of OFCCP, stood up there and said, "I will have an investigative force second to none, not even the FBI, and no employee on my staff shall be promoted unless they perform."

At that moment I was horrified to think that a representative of the U.S. Labor Department had the attitude that gave top priority to such tactics.

I do not feel it is the OFCCP's function to operate like the FBI. The emphasis should be on achieving opportunity and employment, not on regulation and policing.

It was shortly after that meeting that nine mechanical contractors in the Washington, D.C. area received identical conciliation agreements which they had to sign or risk debarment.

At least one contractor had in excess of the goals for minority utilization. However, this did not satisfy the EOS. They were not satisfied with their affirmative action program. So they were issued a conciliation agreement.

It would appear to us that if one has achieved a goal that one indeed has affirmative action and should not be subject to an audit.

When W. G. Cornell was last audited our records and documentation showed good faith. The EOS was amazed that with such a good program I had not achieved the goals. Of course, the fact that we were in a depressed time and laying off people was of no regard. Regardless, I was given a conciliation agreement because I did not orally explain to each of our minorities and females our affirmative action program. The fact that I attached it to their check when they were hired and attach it to their check once a year was of no account.

While we had hired four minority people none were female.

The Chairman. I see.

Mr. Salatto, could you wait one second? I have to go out and take care of one problem. I want to listen to the rest of your statement. Just give me one second.

Mr. Salatto. Certainly.

[Brief recess taken.]

The Chairman. Mr. Salatto, we will put your complete statement in the record, but go ahead and say whatever you would like.

Mr. Salatto. What we basically want to say here is that OFCCP should be concerned with hiring people, not with issuing regulations.

We as an industry have had outreach programs. We have had seminars telling people how to have affirmative action programs. OFCCP participates in seminars that tell people what their rights are against employers. We feel this is right. Employees should know what their rights are.

However, OFCCP should also be involved in seminars which tell interested groups how they should go about getting work, where they should go to get work—they should be working with industry in a joint effort to recruit, train, and educate the interested groups.

The CHAIRMAN. And you do not think they are doing that?

Mr. SALATTO. Not at all. I had one tell me, "The job of OFCCP is to police the industry, not to help the industry."

The CHAIRMAN. Do you think I have been too harsh in some of my criticisms and comments that I have made here today?

Mr. SALATTO. No. As far as I am concerned, the Government should be working in harmony instead of creating confrontation. If we try to work together we can do it. It is not done by walking in with a chip on your shoulder to see whom you can knock down—I do not think you are harsh at all. I join you 100 percent.

The CHAIRMAN. Thank you.

I have a vote on. That is just the life of a Senator. I have to run over to the floor, make this vote, and come right back. If it is a back-to-back vote I might have more problems.

I really want to hear both of you fully. Do you mind waiting until I come back?

Mr. SALATTO. Not at all.

The CHAIRMAN. Normally I would ask staff to just continue to take the testimony, but let me run over there and I will try to come right back. It will take about 5 or 10 minutes, so we will recess until I can get back. I am interested in hearing both of you.

[Recess taken.]

The CHAIRMAN. We will reconvene our committee hearings.

Mr. Salatto, we will put your full statement in the record. I will have some questions for you in a minute or two, but let us go to Mrs. Gaghan.

Mr. SALATTO. Mr. Chairman, I would like to introduce Mrs. Gaghan.

The CHAIRMAN. Please go right ahead.

Mr. SALATTO. Thank you.

With me today is Alma Gaghan. Alma is a widow. When her husband died two of her competitors stepped in to help her over the hurdle of maintaining the business and the transition into taking it over.

Although she is female, minority, handicapped, and averaged only five employees, she was audited by OFCCP and given the conciliation agreement.

Rather than deal with the regulatory agencies that made doing business untenable she sold the business. However, until this conciliation agreement is resolved she is keeping herself available to eliminate these ludicrous charges made by OFCCP.

The CHAIRMAN. Mrs. Gaghan, we are happy to have you here.

STATEMENT OF ALMA L. GAGHAN, GAGHAN PLUMBING CO., ALEXANDRIA, VA.

Ms. GAGHAN. Thank you, Mr. Chairman and members of the committee.

My name is Alma Gaghan, a founder with my husband of the James F. Gaghan Plumbing Co. of Alexandria, Va.

For many years my husband and I worked very hard to build up a mechanical contracting business. After his death in December 1977 I faced the difficult decision of whether to continue.

After deciding that my handicap was not severe enough to prevent me from bearing the full responsibility of the business, I was still concerned as to whether I, a woman, would be accepted into the construction industry with confidence.

My fears were quickly allayed. Other mechanical contractors, belonging to our local association, and the union were extremely supportive and gave me the much needed encouragement to continue.

In April 1978 an experienced and knowledgeable colleague joined me; and by diligently bidding and procuring contracts, through hard work, and many long hours we started the corporation rolling again. Much of our work involved federally funded projects.

Shortly after we learned that the Office of Federal Contract Compliance Programs was increasing its affirmative action requirements.

Through the help of the District of Columbia Mechanical Contractors Association we spent a considerable amount of the time of our small office in developing an affirmative action program including policy statements, posting notices, filling out forms, and carefully filing documentations in 16 folders to have proof of our efforts in each area as required by the regulations.

During this period our workload varied, but we averaged about five employees. All of these were referred to us according to our collective bargaining agreement with the local union of the United Association of Plumbers & Pipe Fitters. We tried to obtain as many minorities as we could and did in fact exceed the goal most of the time.

The **Chairman**. In fact you yourself are a minority—is that correct?

Ms. **Gaghan**. Yes, I am.

The **Chairman**. Could you explain what minority group you belong to?

Ms. **Gaghan**. Yes, I will.

The **Chairman**. You get into that here?

Ms. **Gaghan**. Yes, I do get into that.

The **Chairman**. OK. Please go ahead.

Ms. **Gaghan**. In April 1979 we were audited by the OFCCP, and I was shocked and amazed to find that we were charged with 13 violations. One of the deficiencies cited was our failure to meet the goals of 25-percent minority employment.

During the month of February 1979 our reported minority employment dropped to 18 percent of the hours worked on the job site. The one minority we had was married in February 1979 and elected to take 7 days off to go on his honeymoon.

These 7 days represented 56 working hours on the job site. Had the minority been on the job site, that percentage would have increased to 26.6 percent.

We were audited for an 8-month period from July 1978 through February 1979, and not once did the equal opportunity specialist from the OFCCP ever consider that our average total for minority employment was 29.38 percent.

I had asked the specialist at that time why allowances were not made for these 56 hours that our minority employee had taken off, and he told me that I would have had to hire another minority to replace the one who was on his honeymoon.

But this led to other problems simply because when our minority employee returned from his honeymoon we could not let the new minority go and neither could we let our other minority go. And this was what I was told: to let another nonminority employee go, regardless of his seniority.

The CHAIRMAN. Or his skills, his term of employment with you, or his ability to work for you—you would have had to let him go.

Ms. GAGHAN. That is right.

Well, that is just 1 of the 12 violations. I do not know that I will read all the others. Maybe I will just skim.

One of the other violations was failure to make the female utilization goal of 3.1 percent for all onsite construction.

The CHAIRMAN. Your business has five employees?

Ms. GAGHAN. Yes.

The CHAIRMAN. Does that include you and your partner?

Ms. GAGHAN. No.

The CHAIRMAN. So there are seven employees in total?

Ms. GAGHAN. Right.

The CHAIRMAN. So they wanted you to meet a 3.1 percent——

Ms. GAGHAN. On the jobsite—five employees.

The CHAIRMAN. Did you feel that was reasonable? [Laughter.]

Ms. GAGHAN. No. No, I did not.

The CHAIRMAN. Did you ever want to punch that OFCCP guy right in the mouth?

Ms. GAGHAN. If I were prone to violence.

The CHAIRMAN. You may get there yet. [Laughter.]

Please go ahead. This is so ridiculous.

Ms. GAGHAN. I agree.

The CHAIRMAN. It is just unbelievable. Of course, we have heard so much of this.

Ms. GAGHAN. Well, there is one other violation that I would like to stress.

The CHAIRMAN. We will put your full statement in the record. I notice that you list each one of these violations.

Ms. GAGHAN. Yes.

The CHAIRMAN. I take it you do not feel any of them were really violations.

Ms. GAGHAN. No, I do not. That included my harassing employees.

The CHAIRMAN. You do not look like you would harass anybody.

Ms. GAGHAN. I would not harass anybody in this world, except my children.

I had not attained the goal for women because as a union-employing contractor I obtained skilled workers from the hiring hall and the union had none available to send me.

A number of the other citations were for practices that are not customary among union-employing contractors, and the documentation I had for the other citations was not accepted as sufficient.

While the OFCCP audit and review took about 3 months to conduct, I was given only 5 days to sign the conciliation agreement.

In all good conscience, I could not commit myself or the James F. Gaghan Plumbing Co. to sign the conciliation agreement. The wording of the penalty was not clear.

While on the one hand signing the agreement did not make the signatory guilty of the violations cited, the stipulations in the agreement on the other hand binds the signatory to be further monitored—his activities further monitored—while making an attempt to conduct business.

I perceived this action of signing the agreement tantamount to an admission of guilt. This is a very discouraging situation.

To try to justify my position and obtain some relief from this injustice, I went to the local OFCCP to keep an appointment with the director. I might add that when the appointment was made I was quite well. The appointment had been made 2 weeks in advance.

During that period I developed pneumonia. I did not want to shirk my responsibility. I wanted to get this matter settled, so I kept the appointment, and the director did not show up. Three other people showed up, and it was very unsatisfactory. The next day I went to the hospital, as I should have done the week before.

My experience made me extremely disillusioned with this method of trying to achieve equal opportunity. I felt harassed and assaulted.

It is a difficult job to keep a small business afloat, particularly in the construction industry. I was trying to create jobs and perfectly willing to hire any qualified and capable person.

I am of Filipino/Mexican/Spanish origin and have no prejudice against other minorities and certainly not women. I was making a good faith effort.

Why should my Government send a representative into my office with an attitude of "you are at fault" and demand that I justify my intentions with piles of paperwork? Certainly there is a more equitable and cooperative way to achieve equal opportunity in this land.

The CHAIRMAN. Thank you, Mrs. Gaghan. I sympathize with you.

I think your experience answers the question posed by the Birmingham Press which Mr. Beck brought up earlier: The smaller business goes out of business rather than meet these burdensome requirements. They cannot afford to fight it; and, frankly, in many cases it is not worth fighting.

Ms. GAGHAN. You cannot afford to keep it up.

The CHAIRMAN. Yes, you cannot afford to keep it up; you cannot afford to fight it.

Ms. GAGHAN. You are damned if you do, and you are damned if you do not.

The CHAIRMAN. Your case exemplifies the point that many OFCCP critics make—that it has lost sight of its intended purposes: to help women, minorities, and handicapped people.

I think you make a pretty eloquent case that at least in your instance something has to be done.

Mr. SALATTO. I agree with you that the OFCCP has made business a scapegoat for the problems of this country.

The one positive thing I can say about the OFCCP is that they do not discriminate on the basis of size: They pick on you the same way they picked on Mr. Beck and his company, which admittedly could well afford to pay the $5 million that it cost to take the harassing tactics that they gave, even though they never once—according to him—accused them of one act of discrimination.

Mrs. Gaghan, what happened to your plumbing company when you refused to sign the conciliation agreement? Did you continue in business?

Ms. **Gaghan**. No, I sold the business. I got an offer, and I sold it. I did not need all this extra workload at that time.

The **Chairman**. I take it you wish you had a job with the Federal Government where you would never have to worry about the next day.

Ms. **Gaghan**. I would love it.

May I add one thing, Senator? After that meeting I was never notified as to whether the citations of the "show cause"—if that is what you want to call it—hearing that I was at—if that is what it was—had been rescinded or not. I never received any other correspondence regarding these citations. As far as I am concerned, it has not been resolved.

The **Chairman**. They could still come back at you even though you have closed your business.

Ms. **Gaghan**. That is right; absolutely. I did not sign the agreement, however.

The **Chairman**. Both of you pointed out that you were subject to collective bargaining agreements which forced you to accept workers referred to you from the union construction hall.

Did I understand correctly that the OFCCP instructed you to violate your contractual agreements with the union, especially if the union did not refer women and minorities to you?

Mr. **Salatto**. That is not only correct; they told us that they did not want to hear that we had union contracts—their contract was with the company, and it was up to the company to provide the people that they need, and "don't mention at any meeting that you have a union agreement."

The **Chairman**. It has always been my understanding that Congress intended that labor and management were to abide by the collective bargaining agreements that they enter into. This is certainly inconsistent with your legal obligations to abide by those agreements, and I take it the unions did not care much for this attitude.

Mr. **Salatto**. No, the unions do not care for it at all.

I might add, if I may, locally, we have two unions that have worked with us to generate minority and female participation in the trades, and we are doing it together but not at these astronomical numbers that the Government says we should be achieving, especially in female participation.

The **Chairman**. Again let me come back to Mrs. Gaghan's comment–you are damned if you do, and you are damned if you do not.

Ms. **Gaghan**. That is right.

The **Chairman**. Mrs. Gaghan, you were ordered by OFCCP to hire more female plumbers in order to meet its quota of 3.1 percent female utilization. Do you think 3.1 percent of all the plumbers in the Washington area are women?

Ms. GAGHAN. No.

In 1973 we had a female apprentice plumber. We were delighted. I thought, "This is great to see females out on the construction site." However, she did not last. The work is difficult, and she just dropped out of the program.

It is my understanding that in a case like this we have to do our very best to keep the person in the same occupation, and I just think that is violating the individual's right to do what she pleases. If she wants to drop out, she can jolly well drop out.

The CHAIRMAN. That is right.

I think both of you have added a lot here today, and I think you have been representative of just thousands if not hundreds of thousands of small business owners who feel oppressed, if not by OFCCP by other onerous rules and regulations, as you say, that Uncle Sam has heaped upon you.

I appreciate your taking time to come in here today, and I think your testimony has a great deal of weight in this process--I just want you to know--as small business people.

Mr. Salatto?

Mr. Salatto. Could I add one thing? We think 11246 should be rewritten. It is punitive as it is written. We believe the executive order should be revised to deemphasize regulatory methods and instead encourage the Federal Government, contractors, unions, minority, and women groups to cooperate in joint efforts to seek out, recruit, train, and employ those who seek equal opportunity; and that a construction industry/EEO advisory committee composed of representatives of the Government, industry, unions, and concerned minority and women groups be organized to advise on formulating practical and workable regulations.

The committee should review any regulations before they are put out for public consumption and comments made on them.

We feel a consensus approach would work more in harmony than it would in confrontation.

The CHAIRMAN. You seem to be saying pretty much the same thing that Mr. Beck from Prudential—the big business—said, and that is that we ought to have a positive action program where you have incentives to do business so that they do the best they can to not only not discriminate but to hire minorities, women, and handicapped, and reward them for doing so.

Mr. SALATTO. That is right.

The CHAIRMAN. Thank you. We appreciate all three of you for coming.

Ms. GAGHAN. Thank you for having us.

[The prepared statements of Mr. Salatto, Ms. Gaghan, and Ms. Mrazek follow:]

STATEMENT BY
FRANK J. SALATTO, JR.
VICE PRESIDENT, W. G. CORNELL CO. OF WASHINGTON, INC.
AT OVERSIGHT HEARINGS ON OFCCP
BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE
July 29, 1981

Mr. Chairman and Members of the Committee:

My name is Frank J. Salatto, Jr. I am Vice President of W. G. Cornell Company of Washington, Inc. of Brentwood, Maryland, and also chairman of the EEO Committee of Mechanical Contractors Association of America (MCAA)

First, I would like to state we are in favor of Equal Employment Opportunity and indeed work to achieve it. However the methods utilized by the Office of Federal Contract Compliance Programs to implement the regulations has served only to create an atmosphere of confrontation between OFCCP and industry and have not achieved the objective of helping minorities and women to find jobs in the construction industry. Further, the regulations as implemented by OFCCP serve to fuel inflation in that they create nonproductive work that adds nothing but overhead.

I would like to relate to you my experiences with OFCCP --

When a contractor submits a low bid on a federally funded project, that contractor is subject to a pre-award review of their affirmative action program. At my first such review I was instructed to draw up an affirmative action program. I was given a sample program to use as a guide and advised that what I

"WE ARE AN EQUAL OPPORTUNITY EMPLOYER"

submitted should be similar. I reviewed the eight-page document and determined that the sample had a generous over-duplicity of words and that a quality program could be designed without the unnecessary words. I therefore submitted our plan which consisted of one and a half pages, saying the same, if not more than the sample. It was rejected because "it was not long enough." I was instructed to go back and prepare a longer plan. My second plan consisted of two additional pages of words with no change in the actual plan. The second plan was reluctantly accepted.

We were then instructed to submit our monthly Manpower Utilization Reports, which would keep the Agency informed of our "EEO Posture." On these reports, OFCCP will consider only hours worked on the jobsite. If for any reason a minority or female fails to work all available hours, it may affect adversely one's goals, even though the workforce is adequate to satisfy those goals. If for a period of several months the reports indicate underutilization of minorities, than the company is flagged for audit.

We were advised that if the unions failed to send minorities, we would be required to seek mechanics on our own, even though this may be in breach of our union contract; and if a problem developed, the government would assist us. One contractor tried this, and much to his chagrin, when the union retaliated, the government would not assist him.

At one meeting I suggested that the information requested for a specific reporting format was time-consuming and I proposed an alternate procedure that would produce the same results. The Employment Opportunity Specialist wanted my name, my company name and advised me that he would pay a visit to my office, and if there was no minority in my office staff, he would cite us.

At a later review, prior to award of a contract, I was warned that our records could be audited, and warned in such a manner that it was meant to be intimidating. I replied that an audit would not concern me, since our records were in order.

Several months later I was subjected to the "threatened" audit. Prior to this I determined I should protect the interests of the Cornell Company by documenting all the affirmative action in which I engaged.

During the audit I had my first encounter with 117 questions OFCCP asks to determine if one has exercised properly the 16 steps. Somewhere in the questions one must answer "no" for, no one, except OFCCP, is perfect. With a "no" answer there is a distinct possibility that one will receive a "boiler plate" conciliation agreement.

At the time of this audit I was very proudly showing off the documentation of my efforts. Rather than receive the expected praise I was taken to task because my documentation was on note paper rather than a standard form. As a result of that audit I developed several forms to satisfy OFCCP, but this in no way helped to employ more women or minorities.

The questions and requirements are designed for a company that is large and has a structured growth and not one that may hire only five or twenty-five people or whose employment fluctuates. It is obvious by the questions that no study was made of standard industry practices.

On May 21, 1979, I attended a meeting at the Department of Labor at which Mr. Weldon Rougeau, then director of OFCCP, stated that he "would have an investigative force second to none, not even the F.B.I." and "no one in his department would receive a promotion unless they performed."

At that moment I was horrified to think that a representative of the U. S. Labor Department had such an attitude and gave top priority to such tactics. I do not feel it is OFCCP's function to operate like the F.B.I. The emphasis should be on achieving equal opportunity and not on regulation.

It was shortly after this that nine mechanical contractors in the Washington, D. C., area were issued identical conciliation agreements, which they had to sign or risk debarment. At least one of the contractors had in excess of the goals for minority utilization; however, this did not satisfy the 16 steps in the view of the Employment Opportunity Specialists. One wonders, is the paperwork more important than the employment? In the beginning we were told that if we were in compliance we would not be audited.

When W. G. Cornell Co. was last reviewed, the EOS stated that our records and documentation showed good faith, and she was amazed that with such a good program I had not achieved the goals.

Regardless, I was given a conciliation agreement to sign because: 1) I did not orally explain to the minority and females on the job our affirmative action program, although it was done by the memo attached to the check, and 2) while we hired four minority workers, none were female.

It appears that contractors are in a "Catch 22" position.

It appears that the OFCCP is more concerned with how many citations they can write, rather than how many people may be hired. As one official from OFCCP stated, if we achieve equal opportunity, I am out of a job. The attitude appears to be, "we must find a way to issue citations."

Our local Mechanical Contractors Association developed in conjunction with our unions an outreach program. Contractors and union members attend career day classes to try to interest minorities and females in the trades. Locally we have instituted and held for the last three years, an orientation class for women in December. Contractors spent considerable time organizing, planning and teaching these classes at night to explain the industry in general and the mechanical trades in particular. The attendees are taken through the apprenticeship school for plumbers and pipe fitters and have a question and answer period with female apprentices.

The program is advertised on the radio, in newspapers, announcements sent to schools and all the womens' groups listed in the regulations as being in a position to refer women with specific skills. These groups are supposed to be prepared to refer the crafts needed. However, one such group wrote in reply to our request that we should post our notice in laundromats and felt that this reply discharged their duty as outlined in the regulations.

Many organizations receive government funding supposedly to train women to enter the crafts. Organizations in our area had in their individual classes all of 15 to 20 trainees at any one particular time. It can be readily percieved that many such classes would be needed to produce the numbers required by the regulations.

We believe the Department of Labor has an obligation to report on the results of government funded programs, i.e., How much money has been expended and how many women have benefited and gone into the trades? Questions need to be answered about, Are such programs benefiting the women who are supposed to be the beneficiaries? What is the unit cost for each beneficiary versus administrative cost. How many of the beneficiaries are still active in registered apprenticiship programs with the goal of becoming a journey person?

Programs funded with tax payers money have as much responsibility to account for their efforts as contractors who receive federal contracts for projects funded with tax payers money.

After all this effort over a three year period 19 women decided to enter the apprenticiship program and a number have dropped out. We have documented our efforts and invited and had in attendance members of the OFCCP office at our classes. We have not yet approached the first goal of 3.1 percent, which was required in 1978-79. OFCCP insists the goal of 6.9 percent is attainable now and refuse to review and change the goals to a realistic number.

After one such class an OFCCP official was stating how good the class was and that he was impressed with our effort. I told him I thought the government and industry should work together and not have the government be a police force. His reply was that the government's role was to be the police force and make sure the industry complied with the law.

I have given several workshops on how to establish and maintain an affirmative action program. As a contractor I have made proposals to groups on how to get minorities and women interested in apprenticiship training programs. In contrast, OFCCP participates in workshops sponsored by advocacy groups on what an individual's rights are and what recourse they may have against an employer. While it is important that employees are made aware of their rights, it is just as important, if not more, that OFCCP spend its time and tax payers' money in a productive educational program to instruct potential beneficiaries how to prepare for and obtain a job. I believe the OFCCP should be a partner with the private sector in holding workshops for interested groups in how to get jobs. I further believe OFCCP should hold workshops with business on how to establish and maintain an affirmative action program and jointly develop resources to obtain the objectives, rather than walk in and issue platitudes and citations. The ultimate objectives should be jobs not paperwork.

I had the ocassion to review a social studies assignment with my son last year and read that in the 1880's the Department of Agriculture was formed to help the farmer. I asked a representative of the Office and Management and Budget, When did our government decide to become our adversary instead of our helper?

The purpose of affirmative action would be better served if the collective expertise of the schools, community and government was directed to helping the contractor meet affirmative action obligations. The contractor is the one who provides the jobs and limiting his capability to do so does not help the people who are supposed to be the beneficiaries of affirmative action programs.

It concerns me that private enterprise, which made this country strong, has become the scape goat of everything that ails this country. The only rights left for business are to make payroll - and pay taxes and to be sure they stay healthy enough to accomplish both.

With me today is Alma Gaghan - Alma is a widow. When her husband died, two of her competitors stepped in to help her over the hurdle of maintaining the business and make the transition a little easier for her. Although she is female, minority, handicapped and averaged only five employees, she was audited by OFCCP. The problems were such for her that she decided it was not worth it to stay in business and deal with the government so she sold the business and walked away from what she and her husband built ..

STATEMENT BY
ALMA L. GAGHAN
AT OVERSIGHT HEARINGS ON OFCCP
BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE

July 29, 1981

Mr. Chairman and Members of the Committee:

I am Alma L. Gaghan, a founder with my husband of the James F. Gaghan Plumbing Company, Inc., of Alexandria, Virginia.

For many years my husband and I worked hard to build up a mechanical contracting business. After his death in December 1977 I naturally faced the difficult decision of whether to continue. After deciding that my handicap was not severe enough to prevent me from bearing the full responsibility of the business, I was still concerned as to whether I, as a women, would be accepted into the construction industry with confidence. My fears were quickly allayed. Other mechanical contractors, belonging to our local association, and the union were extremely supportive and gave me the much needed encouragement to continue.

In April 1978 an experienced and knowledgable colleague joined me, and by diligently bidding and procuring contracts and through hard work and long hours, we started the corporation rolling again. Much of our work involved federally funded projects.

Shortly after, we learned that the Office of Federal Contract Compliance Programs was increasing its affirmative action requirements. Through the help of the District of Columbia Mechanical Contractors Association we spent a considerable amount of the time of our small office in developing an affirmative action program, including policy statements, posting notices, filling out forms and carefully filing documentations in sixteen folders to have proof of our efforts in each area as required by the regulations.

During this period our work load varied, but we averaged about five employees. All of these were referred to us according to our collective bargaining agreement with the local union of the United Association of Plumbers/Pipe Fitters. We tried to obtain as many minorities as we could and did exceed the goal most of the time.

In April of 1979 we were audited by the OFCCP, and to my shock and amazement were charged with thirteen violations. One of the deficiencies cited was our failure to meet the goals of 25 percent minority employment. During the month of February, 1979, our reported minority employment dropped to 18 percent of the hours worked on the job site. The one minority we had, in this case, was married in February of 1979 and elected to take seven working days off to go on his honeymoon. This seven days represented fifty-six working hours on the job site. Had the minority been on the job site, that percentage would have increased to 26.6 percent.

We were audited for an eight month period from July, 1978, through February, 1979, and not once did the Equal Opportunity Specialists from the OFCCP ever consider that our average total for minority employment was 29.38 percent. For this one month period, I suppose, we were bound to hire another minority in order to fulfill our goal -- never mind the fact that when the new bridegroom returned to the job site we had another difficult problem on our hands. The newly hired minority could not be laid off and neither could he/she be absorbed by the company, for we were a small business, and it is not economically feasible. Instead, we would have been required to lay off a non-minority regardless of his seniority.

The other twelve violations as stated in OFCCP's letter included:

1. "Failure to meet the female utilization goal of 3.1 percent for all on-site construction crafts. This is in violation of 41 CFR 60-4.6, Appendix A."

2. "Failure to insure and maintain a working environment free of harassment, intimidation, and coercion at all sites and in all facilities where your employees are assigned to work. This is in violation of 41 CFR 60-4.3, Specification 7 (a)."
3. "Failure to notify minority and female recruitment sources and community organizations when your company had hiring opportunities. This is in violation of 41 CFR 60-4.3, Specification 7(b)."
4. "Failure to establish and maintain a current file of the name, address, and telephone number of each minority and female walk-in applicant and minority or female referral from a union, recruitment source or community organization, and of the action that was taken with respect to each individual. This is in violation of 41 CFR 60-4.3, Specification 7(c)."
5. "Failure to disseminate company EEO policy to unions, training programs and internally. This is in violation of 41 CFR 60-4.3, Specification 7 (f)."
6. "Failure to maintain a record that you review, at least annually, the company's EEO policy and affirmative action obligations under the contract specifications with all on-site supervisory personnel (superintendents, general foremen, etc.). This is in violation of 41 CFR 60-4.3, Specification 7 (g)."
7. "Failure to disseminate EEO policy externally to all recruiting sources. This is in violation of 41 CFR 60-4.3, Specification 7 (h)."
8. "Failure to encourage present minority and female employees to recruit other minorities and women and, where reasonable provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of the Contractor's workforce. This is in violation of 41 CFR 60-4.3, Specification 7 (j)."
9. "Failure to contact schools and organizations with minority and female

enrollment that can serve your hiring needs. This is in violation of 41 CFR 60-4.3, Specification 7 (i)."

10. "Failure to conduct at least annually an inventory and evaluation at least of all minority and female personnel for promotional opportunities, and encourage these employees to seek or to prepare for, through appropriate training, such opportunities. This is in violation of 60-4.3, Specification 7 (1)."

11. "Failure to ensure that all facilities and company activities are non-segregated. This is in violation of 41 CFR 60-4.3, Specification 7 (n)."

12. "Failure to conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations. This is in violation of 41 CFR 60.4.3, Specification 7 (p)."

I had not attained the goal for women because as a union-employing contractor, I obtained skilled workers from the hiring hall, and the union had none available to send me. A number of the other citations were for parctices that are not customary among union-employing contractors, and the documentation I had for the other citations was not accepted as sufficient.

While the OFCCP audit and review took about three months to conduct, I was given only five days to sign the agreement and return it.

In all good conscience, I could not commit myself or the James F. Gaghan Plumbing Co., Inc. to sign the Conciliation Agreement. The wording of the penalty was not clear. While, on the one hand, signing the Agreement did not make the signatory guilty of the violations cited, the stipulations in the Agreement, on the other hand, binds the signatory to further monitor his/her activities, while making an attempt to conduct business. I perceived this action of signing the Agreement tantamount to an admission of guilt. This was a very discouraging situation.

To try to justify my position and obtain some relief from this injustice, I went to the local OFCCP office to keep an appointment with the office supervisor, even though I was suffering from pneumonia. The supervisor did not keep the appointment, and the matter has never been completely resolved. This only added insult to injury, and I landed in the hospital the next day.

My experience made me extremely disillusioned with this method of trying to achieve "equal opportunity." I felt harassed and assaulted. It is a difficult job to keep a small business afloat, particularly in the construction industry. I was trying to create jobs and perfectly willing to hire any qualified and capable person. I am of Filipino/Mexican/Spanish origin and have no prejudice against other minorities and certainly not women. I was making a "good faith effort." Why should my government send a representative into my office with an attitude of "you are at fault" and demand that I justify my intentions with piles of paperwork. Certainly there is a more equitable and cooperative way to achieve equal opportunity in this land.

Mechanical Contractors Association of America, Inc.
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Telephone (202) 654-7960 TWX: 710-825-0423

STATEMENT BY THE
MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA, INC.
AT OVERSIGHT HEARINGS ON OFCCP
BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE
JULY 29, 1981

Mr. Chairman and Members of the Committee:

We are here today representing firms belonging to the Mechanical Contractors Association of America, Inc. These firms build systems that move fluids, both liquid and gas, including heating, ventilating, cooling, air conditioning and plumbing systems in buildings. They also construct mechanical systems in industrial facilities, power plants, sewage treatment works, etc., and service and maintain the systems.

At their request, we are also representing 25,000 similar firms in associations in electrical sheet metal, insulation, roofing, painting, decorating and other specialty construction, which have organized into the Associated Specialty Contractors, Inc. This group employs over 800,000 workers, most of whom are unionized.

I am Thelma Stevens Mrazek, Director of Communications of the Mechanical Contractors Association of America. I also have staff responsibility for equal employment opportunity programs. With me is Frank J. Salatto, Jr., Vice

President of the W. G. Cornell Company of Washington, Inc., located in Brentwood, Maryland, who is Chairman of the Association's Equal Employment Opportunity Committee, and Alma L. Gaghan, formerly of the James F. Gaghan Plumbing Company of Alexandria, Virginia.

I will briefly summarize the views of construction contractors across the country in regard to equal employment opportunity and the Office of Federal Contract Compliance Programs (OFCCP) regulations and enforcement policies and state in general what new directions this industry feels should be taken. Mr. Salatto and Mrs. Gaghan will then relate their own personal experiences regarding OFCCP enforcement. They will provide a vivid example of the problems that firms in this industry have encountered.

First, we wish to make clear that construction contractors recognize and support Equal Employment Opportunity Laws and the principles of affirmative action. We wish to allay the fears of minority and women's groups who are concerned that their hard won and recognizable rights may be denied them.

Rather, we are here today to deplore the methods of enforcement and to speak for the rights of American employers, who provide the jobs in this country, and particularly small business people. We will demonstrate that federal regulations have not fulfilled intended objectives or proved workable, have instead assumed a "policing" attitude and have made adversaries of the government and people running companies.

Beginning in 1978 the Office of Federal Contract Compliance Programs issued a series of new regulations for the construction industry -- separate from service and supply industries -- that imposed goals that contractors must meet in hiring minorities and women on the jobsite. They also required each contractor to comply with 16 detailed affirmative action steps.

These regulations were written without regard to how the construction industry operates. They were unrealistic and sometimes impossible requirements that caused adverse effects on employers, employees and the industry itself. Attempts by the industry to modify the regulations during the so called "review" process or afterwards, proved futile.

These regulations have been enforced in an uneven and contradictory manner across the country. More often than not, the regulations and enforcement have focused on procedures and paperwork rather than on finding jobs for minorities and women.

The construction industry is different from other sectors of the national economy. Among other characteristics, eighty percent of the firms are small businesses, whose work is highly influenced by economic cycles and by seasons. It is divided into two segments:

(1) The union-employing contractor hires members of a special trade for specific work periods on request to a union hiring hall. The collective bargaining agreement determines the terms of referral, wages and conditions of employment. The union decides on its membership and primarily controls apprenticeship and training programs.

(2) The nonunion contractors, on the other hand, recruits, trains and hires workers for permanent employment.

Following is a brief summary of the major problems OFCCP regulations have caused construction firms:

1. Based on Executive Order 11246, OFCCP instituted an enforcement system whereby any construction contractor who once obtains a federal contract is policed under a system of "guilty until proven innocent."

2. Between 1978 until last winter OFCCP issued an unrelenting stream of proposed new regulations, rules and revisions with dubious legal authority and lack of substantive research or analysis to support OFCCP's expansion of authority. We believe such regulations ranged far beyond the scope intended by the Equal Employment Opportunity Act of 1964 or Executive Order 11246. As a result, construction industry employers were faced with confusion and instability and had to focus on coping with the onslaught of regulatory change rather than on the real objective of affirmative action.

As an example, on September 7, 1979, OFCCP published a proposed paragraph 7q, as an addition to 41 CFR 60-4.3 (a), with the stated intent of "clarifying" contractors requirements for the employment of women and minorities. Paragraph 7q states that construction contractors, who are once subject to OFCCP's regulations on the employment of minorities and women on federally funded jobs, are subject to those requirements on each and every one of their construction projects. In other words, any contractor who has one federal or federally funded construction project anywhere is subject to the OFCCP regualtions on all other work, everywhere in the country, regardless of whether the other jobs are public or private. This was not a clarification of existing policy, but a new rule which, if enforced, will significantly alter current regulations. Paragraph 7q has no legal foundation, we believe. Neither current statutory nor executive order authority grants OFCCP jurisdiction to review private (non-federal) work in areas where a federally-involved contract does not exist.

3. OFCCP promulgated "goals" and timetables for hiring minorities and women in the workforce that were unreasonable and disregarded the fact that there is a wide variety of skills and different levels of training needed for the various trades in the industry. They, for example, disregarded that in the case of plumbers and pipe fitters it takes four years of apprenticeship training. They also disregarded the fact that union employing contractors must rely on the unions voluntarily to supply minorities and women. Under the regulations referral unions in the construction industry are not required to comply with the on-site workforce goals.

In many instances these "goals" have been enforced as quotas. OFCCP reviews contractors with the absolute expectation that the "goals" will be met. They issue conciliation agreements with "make-up hours" where a contractor has not met the "goals". OFCCP even labels the goals in conciliation agreements as "required goals".

4. It set up 16 detailed actions or "steps" that each contractor was required to adhere to regardless of traditional industry practices. Union-employing contractors, for example, which rarely have employment departments because the firm hires from the hiring hall, were required to set up employment operations, advertise for employees, and actively solicit or hire, even though the employers' collective bargaining agreement may not have permitted this. Union employers were forced to add to their overhead and thus be less competitive in relation to nonunion contractors.

As another example, one part of the regulations [41 CFR-60-4 (a) (7d)] requires union-employing contractors to:

> *Provide immediate written notification to the director [of OFCCP] when the union or unions with which the contractor has a collective bargaining agreement has not referred to the contractor a minority person or woman sent by the contractor, or when the contractor has other information that the union referral process has impeded the contractor's efforts to meet its obligations.*

OFCCP's Compliance Manual adds that:

> *To demonstrate compliance the contractor must produce copies of letters timely sent to the director and/or the appropriate OFCCP regional office to verify its claim that the union is impeding the contractor's efforts to comply.*

Instead of fostering cooperation between contractors and unions to employ minorities and women, the government has again set up an adversary environment. For those who know the real world of labor relations it is not difficult to imagine the explosive labor problems that union-employing contractors would face if they followed this requirement.

5. The 16 affirmative action steps require contractors to undertake for the most part extensive and unproductive efforts. These include keeping lengthy lists of minority and women's groups, subcontractors and suppliers and constant notification and record keeping of each new project or business development.

6. OFCCP also requires contractors to produce an extraordinary amount of documentation to prove their compliance. These include policy statements, memorandum, letters, forms or other records. A sample of the paperwork requirements that each construction contractor must produce has been prepared by MCAA's EEO Committee and is submitted for the record. You will notice it totals approximately 70 pages.

7. OFCCP enforcement has been uneven, in some cases heavy handed and expensive to many firms. OFCCP has sent untrained EEO Specialists, many of whom have little knowledge of the operations of private industry, to act as "judges" on a contractor's compliance.

According to OFCCP procedures, a contractor who has complied with the 16 affirmative actions steps should be found in compliance, but compliance is complicated by the fact that OFCCP's Compliance Manual, has subdivided the 16 steps. Unfortunately OFCCP provides no definition of "sufficient documentation" of the 16 steps or the 117 questions, and a contractor must score 100 percent on review of the 117 questions in order to be found in compliance.

If OFCCP finds that a contractor is not in compliance, the contractor is sent a "Conciliation Agreement" to sign, which usually sets higher goals and more stringent requirements. Experience has shown that there is little opportunity to negotiate the terms. A contractor who signs a conciliation agreement waives certain procedural safeguards in OFCCP's due process procedures. Usually there are no terms difining the bounds of the conciliation agreement and no expiration period. If contractors are found not to be in compliance with the conciliation agreement, they are subject to immediate enforcement action.

To obtain relief after enforcement begins, a contractor must spend hundreds of hours or dollars in legal fees before administrative remedies are exhausted and action is initiated in court.

CONCLUSION AND RECOMMENDATIONS

Construction employers regret the needless dissension and unproductive requirements that have been forced on the industry.

To reverse this situation, we recommend that:

1. Executive Order No. 11246 be revised to deemphasize regulatory methods and instead encourage the federal government, contractors, unions, minority and women's groups to cooperate in joint efforts to seek out, recruit, train and employ those who seek equal opportunity.
2. A Construction Industry EEO Advisory Committee, composed of representatives of the government, industry, unions and concerned minority and women's groups be organized to advise on formulating practical and workable regulations. The committee should review proposed regulations before they are promulgated to determine their necessity and validity. Regional hearings should be held before any regulations are issued.

This consensus approach of all involved parties should result in a program that is not based on confrontation and one that obtains realistic, workable and equitable results.

The CHAIRMAN. Our last panel will be a bank panel, and we will invite Stephen Glenn, vice president of Bank of the West; Jack Smithwick, senior vice president of the First American Bank of Nashville; and Robert Hill, president of the National Bank of Greenwood. Perhaps we can take the testimony in that order.

Mr. Glenn, we will take you first.

Excuse me, Mr. Glenn. Senator Quayle from Indiana is with us.

Senator QUAYLE. I am not the only one from Indiana who is here. We have two outstanding witnesses, Mr. Chairman.

First of all, I would like to compliment you for holding these hearings on this very important matter. Considering the last couple of weeks that you have had—to now get involved in this very complex issue—you are to be not only commended for your energies but your intellectual foresight.

The CHAIRMAN. You have shared those last 2 weeks with me as a member of all those conference committees. They have certainly been difficult.

Senator QUAYLE. Mr. Chairman, I just want to emphasize my appreciation for two of my very distinguished constituents here who will be testifying on the problems that they have had—Robert

Hill who is the president and Mr. Wilson Hurrell who is the vice president of the National Bank of Greenwood, Ind.

I talked to them yesterday, and you will find their testimony, Mr. Chairman, very straightforward. They have certain factual communications that they will give to this committee. It will be very beneficial to us as we deliberate on this issue.

I just wanted to take this time to welcome them and to let you know that they will live up to the fine example of Hoosiers that we all have.

Thank you very much.

The CHAIRMAN. Thank you.

Mr. Glenn?

STATEMENT OF STEPHEN C. GLENN, SENIOR VICE PRESIDENT, BANK OF THE WEST

Mr. GLENN. Thank you very much.

Good morning. My name is Stephen Glenn, and I would like to read an abbreviated version of my testimony, submitting the entire testimony for the record in the interests of time.

The CHAIRMAN. Without objection, all full statements will go in the record after the panel discussions.

Mr. GLENN. By way of introduction, I am a senior vice president of Bank of the West and am speaking as a representative of this bank. My responsibilities at the bank include those of being director of human resources and corporate planning.

I would like to stress at this point that Bank of the West fully supports the concept of affirmative action and providing equal employment opportunities for all protected class members.

In the period from 1975 through 1980 the results of these efforts clearly show in the statistics.

For example, total minority employment at the bank rose 64 percent during that period from 15.3 to 25.1 percent. This compares with an available labor force in our market area of 20.6 percent minorities based on a California Employment Development Department statistics for affirmative action programs.

Minorities in officials' and managers' jobs during that same period of time increased 155 percent from 6.5 to 16.6 percent. This compares with an approximate available labor force based on EDD statistics of 14.5 percent.

During that same period of time women in the bank have also fared very well. The number of women in officials' and managers' positions increased 57 percent from 28.8 to 45.3 percent. This compares with an available labor force of approximately 36.9 percent based on May 1980 EDD statistics.

The OFCCP throughout the review of Bank of the West has never focused on the real results of the programs that have been in place in our bank for several years.

A compliance review was initiated at our bank by the San Jose office of the OFCCP on December 17, 1979. That compliance review was closed on July 7, 1981.

The bank had spent through June 16, 1981, a total of 3,498 manhours on the review with a total cost of labor, computer time and programing, legal and consultant fees, and Xeroxing expenses related to this review in excess of $83,350.

I might add that after preparing the testimony I received an additional bill from my time-sharing computer service for $31,000.

The CHAIRMAN. You are well over $110,000—about $115,000?

Mr. GLENN. That is correct.

Throughout this process the OFCCP has been unable to find any significant deficiencies of any kind in our bank. There was never a question of an affected class, discrimination, underutilization, or lack of progress toward goals and timetables. We were even told by OFCCP that the bank had an excellent reputation with minority agencies and community groups for working with them.

Historically, this is how the review proceeded: On December 18, 1979, we received the OFCCP's standard letter requesting the desk audit information data, with the data to be provided to the OFCCP before no later than January 17, 1980.

The bank routinely prepared the data requested in the desk audit letter and had that information reviewed by the bank's legal counsel—the firm of Jackson, Lewis, Schnitzler & Krupman—who specialize in labor and EEO law.

We were advised by legal counsel that our package of requested data was in compliance with the OFCCP regulations.

The bank then on January 18, 1980, attempted to submit the requested desk audit information. When the information was delivered to the OFCCP offices the Agency refused to accept the data and called us to request that we not submit it at that time.

We then resubmitted the package of information on January 25, 1980, as requested by the OFCCP.

On February 6, 1980, we received a phone call from the person who had been assigned to do the bank review, Mr. Angel Luevano, who asked to set up a meeting to discuss and clarify some of the desk audit information. He indicated that he had some concerns as to whether or not the desk audit submission was reasonable.

The bank scheduled a meeting for February 8, 1980, with Mr. Luevano; the bank's attorney, Mr. Cronin; myself; and Mrs. Lois Larson, the bank's affirmative action officer. This meeting lasted approximately 2 hours.

At this initial meeting we explained the computerized format of our AAP in detail and discussed the organizational structure of our bank.

Mr. Luevano discussed the possibility of issuing a show-cause letter and stated that this would also eliminate the 60-day time clock problem.

We reviewed the plan in detail, with our attorney outlining how it complied with the regulations. Mr. Luevano indicated he had some concerns about the appropriateness of the bank's job groupings but conceded that he had never reviewed a bank and was unfamiliar with the jobs, their content, and the industry.

At the conclusion of the meeting we had the impression that we had answered his questions and that it would not be necessary for the Agency to issue a show cause letter.

The next contact from the OFCCP was receipt of a show-cause letter on February 20, 1980. Five working days had elapsed since our meeting with Mr. Luevano and February 18, the date the letter was sent.

I noted the amount of time that was spent with the bank in discussing these issues and the amount of time elapsed, because in a later OFCCP communication and conferences they stressed the extensive amount of time spent in negotiating with the bank prior to the issuance of the show cause letter. This show cause letter erroneously described the bank's workforce analysis and job grouping and stated that it was unacceptable.

The bank met with Mr. Luevano and his supervisor, Mr. Oroz, on February 22 and explained the same information we had covered in our meeting of February 8, 1980. We explained that the OFCCP had erroneously described what we had submitted, which they conceded.

On March 27 we received a letter from Mr. Luevano stating that the OFCCP had completed the desk audit and was coming onsite to complete the review. The letter included a request for a substantial amount of information within 10 days, which allowed only 7 working days.

It should be noted here that the bank was consistently required to incur significant overtime expenses and work staff weekends to meet the unreasonable time-frame deadlines imposed on it by the OFCCP.

Throughout this review the OFCCP utilized its power to request information and reports as a vehicle to harass the bank. The agency was well aware of this tactic.

In a meeting on March 31, 1980, the first day of the onsite, Mr. Luevano told me they had several discussions in their office before coming onsite and were pressuring to see how much information they could collect from the bank.

There were many other examples of this technique during the next 3 weeks while the OFCCP was onsite. For example, on April 22, 1980, in a meeting with Mr. Luevano when we asked why the review of Bank of the West was taking so much longer and requiring us to generate so much more information than any other bank in the State, he told us the following:

He stated that he had not found any serious problems, that he was just very thorough in his approach. He said that he had reviewed the work done at Crocker, Wells Fargo, and Bank of America by the San Francisco office and while he did not like to talk down his own agency those reviews were performed in an inadequate fashion and would have been unacceptable to him or the San Jose office.

He went on to state rather proudly that he had earned a reputation in his previous reviews as being difficult to deal with and taking an adversarial approach toward the contractors he was reviewing. He said he did not know why this was so—perhaps it was just his nature.

He stated further that if he really wanted to be difficult he could ask us for information going back to 1972 or even 1968 but he did not intend to in our case because we were cooperative.

He also explained that he was a law school graduate and although he was not an attorney he had a good deal of title VII litigation experience from his previous employment.

His message was clear: If we objected to his tactics he could make it more difficult and expensive for us.

During the 3 weeks of this first onsite we were required to spend hundreds of man-hours reformatting manually information that was computerized and completing statistical analyses that should have been done by OFCCP staff.

On the final review of this first onsite we were advised by the EOS that he had found no serious problem. He went on to say that they would have a meeting that afternoon with his supervisors to discuss Bank of the West's review and determine the agency's course of action.

At 4 p.m. that day I received a phone call from Mr. Luevano who indicated that he had some bad news: The OFCCP had decided to amend the original show cause and found the bank's affirmative action program unacceptable and unreasonable.

The CHAIRMAN. This seems like blackmail or at least intentional abuse, if it is the way you are telling it.

Mr. GLENN. I think there is clear evidence as my testimony moves along—I would characterize it more as extortion.

The CHAIRMAN. I think that is a good characterization. That is exactly what it is.

Go ahead—I am sorry.

Mr. GLENN. This decision he said was based on our job grouping. He stated that he was working on drafting the amendments to the show cause letter and we would receive them within 2 weeks. The bank never has received any amended show cause notice.

The CHAIRMAN. Would you like us to call Mr. Luevano as one of our witnesses in these hearings?

Mr. GLENN. I would have no objection to your doing that, Senator.

The CHAIRMAN. We might want to do that because, my gosh, if this is exemplary of the way these people operate maybe we had better get a few of them up here.

I will just throw out the challenge. I would like to receive the names and formal job designations of anybody at the OFCCP from anybody in business throughout this country who feels they have a legitimate case. They had better make a legitimate case, though, because we are not about to harass them. What we want to do is stop this kind of horse manure that has been going on in our country. It is shocking.

Go ahead.

Mr. GLENN. Our next contact from the OFCCP came 11 weeks later on July 9, when we received a letter from William Gladden, assistant regional administrator in San Francisco.

His letter stated that our AAP was too seriously deficient to conduct a desk audit and they were ready to pursue enforcement. This was despite the fact that they had previously advised us in writing that they had completed the desk audit and they completed an onsite review.

At the conciliation conference held on July 30, 1980, the bank and our attorneys met with Mr. James Southard, chief of operations of the regional office; Mr. James Chen, also from the San Francisco regional office; and Mr. Luevano.

The meeting focused on the bank's job groupings. The bank pointed out that the definition of job groups in the regulations was in parentheses and that it required that groups of similar content, compensation, and opportunity be grouped together.

We argued, to no avail, that our present grouping met this test. We also cited several banks and savings and loans that this region had recently reviewed and approved with the same job groupings as Bank of the West.

The **Chairman**. Excuse me just one second, Mr. Glenn. I am going to run and vote. Senator Quayle will take the testimony, and I will come back so he can run and vote. If he has to leave before I get back, then let us just go on to Mr. Smithwick, and we will get this record made today. Go ahead.

Mr. **Glenn**. We noted that the OFCCP had approved this format in the widely published Chase Manhattan conciliation agreement. We provided copies of the proposed regulations for the banking industry that the OFCCP had published at the time our bank developed its AAP calling for the same format we provided.

We also provided a copy of the agency's policy issuance ARA 78-17/60-1 directed specifically at contractors with previously approved automated reporting formats. We were advised that all of these facts were not relevant to our case.

We were later told by Mr. Luevano on April 30, 1981, that at this time the region had 29 other approved plans with our salary grade-based types of job groupings.

We asked OFCCP if we changed our format and reprogramed the computer would it be acceptable for our next review. We were told by Mr. Southard that if we changed our job groups this time there could be no assurance that they would be approved in future reviews.

Mr. Chen reviewed our utilization analysis and commented that with 900 people the bank showed a very small number of underutilized job groups; therefore, if we were in that much compliance, our job groupings must be inappropriate.

After threats of enforcement action the bank conceded to amend its job groups and revert from an automated program to a manual one for monitoring progress. We were given 5 days to revise our job groups and submitted a proposed job grouping on August 5, 1980.

We advised the agency that we would provide a revised AAP within 30 days of approval of our job groups. When we heard nothing by September 8, 1980, I wrote Mr. Southard to determine our next course of action and offered to submit a revised program at their convenience.

I received a response from Mr. Cordova of the San Jose office on September 15, 1980, stating that they could not give prior approval to job groups and that our revised AAP was late. We hand delivered it the same day.

This was the last we heard from the San Jose office until March 9, 1981, when we received a phone call from Mr. Luevana. Six months had elapsed.

We received a letter from Mr. Cordova on March 24, 1981, advising us of another onsite review and requesting voluminous information while allowing only 9 working days to complete it.

Another onsite review was initiated April 27, 1981, and concluded in 1 week. Again the agency was unable to identify any significant problems.

We were then presented with a draft of a conciliation agreement and were told we could conclude the review by signing it. It covered the areas impacted by the revised job groups. Mr. Luevano also conceded that the 18 months spent on the review had had no real bottom line impact on the bank's affirmative action posture.

On May 14, 1981, the bank responded to the San Jose office with a letter of commitment that addressed all the issues in the conciliation agreement. It should be noted that all of these changes had already been implemented.

This was accompanied by a legal opinion citing its appropriateness prepared by bank counsel and delivered to Mr. Oroz and Mr. Luevano. They indicated surprise at the bank's response.

I received a phone call from Mr. Cordova on May 18, 1981, who indicated that he was surprised that the bank would not sign the conciliation agreement. He questioned why we wanted to challenge their procedures. He said he would not accept a letter of commitment and would move to enforcement. He indicated that if the bank did not sign the conciliation agreement it could cost us another $74,000 and stretch out another 1½ years, possibly 3 years.

He stated he was having his staff reanalyze our data to "make sure they had not overlooked any problems." He said they would do a "thorough offsite analysis" to attempt to detect "additional deficiencies in the bank's AAP." He also noted this would not be necessary if we signed the conciliation agreement.

He compared our review to the *Firestone* case, one he had initiated in Texas. He said that while OFCCP had lost the case he personally viewed it as a victory as it helped clarify the rules. He also noted that it took several years and cost a great deal of money.

He then requested a meeting with McKenzie Moss, the bank's president, to make certain he understood the implications of not signing the conciliation agreement.

On May 26, 1981, a meeting was held at the bank with Messrs. Moss, Cordova, Oroz, Luevano, Cronin, and myself. Mr. Cordova reviewed the case and consequences of not signing the conciliation agreement. Mr. Moss noted that his presentation appeared to be a threat, and the discussion became somewhat heated.

During the discussion, when asked about some specifics in the bank's letter of commitment, Mr. Cordova said that he had not personally read it—it was addressed to him—and that it was still being processed by his staff. He also said that he had not personally reviewed the bank's AAP.

Mr. Cordova stated that the matter was now out of his hands and we could talk to Mr. Gladden, the assistant regional administrator, if we wished.

I telephoned Mr. Gladden's office that afternoon to set up a meeting and again the following day. Neither call was returned. A meeting was eventually set up through Ms. Sanchez of Congressman Norman Mineta's staff. It took place on June 16, 1981, in Mr. Gladden's office in San Francisco.

In attendance at that meeting from the bank were: Mr. Edouard Finot, chairman; McKenzie Moss, president; Lois Larson, assistant vice president and affirmative action officer; Frank Cronin, bank counsel; and myself. Mr. Gladden was present, as was Ms. Lucille Hearne, a member of the OFCCP staff.

During the meeting we reiterated the concerns that we had as to the manner in which the bank's compliance review had been conducted and the tactics that were being used by the San Jose office in their review of Bank of the West.

Mr. Gladden during the meeting indicated that from his file he had on the bank he was unable to determine if an onsite review had even been conducted. He said that he had been briefed on the bank's review by Mr. Luevano and he had instructed him to go back and amend the show cause letter identifying some substantive issues as nothing in the case presented thus far was of any substance.

We requested that Mr. Gladden carefully review the material that had been previously submitted and take a look at the original package that had been submitted by the bank.

We were contacted by the OFCCP on Thursday, June 25, 1981, when Ms. Hearne called to indicate that Mr. Gladden, after reviewing the case, had determined the original show cause had been erroneously issued. They later determined that we had "shown good cause" and that the San Francisco region was willing to rescind it. A meeting was set for July 7 to negotiate a letter of commitment closing the review.

This whole process has now consumed over 18 months, almost 3,500 man-hours, and cost Bank of the West in excess of $83,000.

The bottom line is that the bank's basic affirmative action efforts have remained unchanged and there have been no additional employment opportunities created as a result of this exercise. There was never even a suggestion of discrimination on the part of the bank, no one has really benefited from this review in the least, it has cost the bank a great deal of money, and I trust the Government has spent an inordinate amount of time and money on one review that focused only on technical minutae while it seemed to overlook the basic concept and purpose of an affirmative action program: to provide employment opportunities for protected class members.

Thank you very much.

Senator **Quayle** (acting chairman). Thank you very much, Mr. Glenn.

Now the committee will hear from Mr. Hill.

STATEMENT OF ROBERT HILL, PRESIDENT, NATIONAL BANK OF GREENWOOD, GREENWOOD, IND., ACCOMPANIED BY WILSON A. HURRELL, VICE PRESIDENT AND PERSONNEL ADMINISTRATOR AND GREGORY J. UTKEN, ATTORNEY AT LAW

Mr. **Hill**. Senator, we have submitted to you, I think, copies of our formal statement; and we would ask that that be inserted in the record.

With your permission, I have about 5 minutes of remarks which I would like to make. I think they are pertinent to the problem that we are facing. After the conclusion of my remarks, Mr. Wilson Hurrell, a colleague of mine, would also like to make a few pertinent remarks.

Senator **Quayle**. That will be fine.

Mr. **Hill**. Mr. Chairman, I am Robert Hill, president of the National Bank of Greenwood. We welcome the opportunity to appear before this committee of the Senate to relate to you some of the experiences with the Office of Federal Contract Compliance Programs.

The National Bank of Greenwood was chartered in 1934 and is located in Greenwood, Ind., a city of about 20,000 people, located in Johnson County, which is 15 miles south of Indianapolis, Ind.

We are a medium-sized community bank with assets of $117 million and employ 138 full-time and part-time people. Our banking operations consist of the main office and three branches, all of which are located within 3 miles of the main office.

The bank's service area encompasses the northern six townships of Johnson County and part of the two southernmost townships of Marion County located immediately to our north. We do not service Indianapolis, other townships in Marion County, or any other counties.

Our bank prides itself on being an equal opportunity employer and has vigorously followed and applied personnel policies without regard to race, sex, religion, national origin, veteran status, age, or handicap.

We are fundamentally committed to these concepts; and we have had an affirmative action program since 1976, prior to our coverage under Executive Order 11246.

Because of the relatively small size of our bank we do not have a formal personnel department. Rather, Mr. Wilson Hurrell, our vice president who is present with me today, acts in a personnel capacity and has one secretary working with him.

Senator QUAYLE. Mr. Hill, I sincerely apologize for interrupting you, but I am going to have to depart. I am going to miss the vote if I do not. Senator Hatch is on his way back here. He anticipated getting back at about the time I had to leave, but looking at the clock I see that I am going to have to jog a little bit to get over there.

I just want, first of all, to commend you for the fine statement that you have submitted and just say that this is just the beginning. We will be looking forward to working with you and others on this panel trying to resolve some very difficult problems.

So please just hold up for a few short moments until Senator Hatch returns and excuse the inconvenience. We are on the tax bill today, and we are going to be voting all day and maybe even into the night, so I am going to have to depart.

Mr. HILL. We understand that, Senator.

[Brief recess taken.]

The CHAIRMAN. Let us continue, gentlemen.

Mr. HILL. Thank you, Senator.

As I said, our bank, because of its relatively small size, does not have a formal personnel department. Rather, Mr. Wilson Hurrell, a vice president of our bank who is with me today, acts in a personnel capacity and has one secretary working with him. His duties include many other areas besides personnel.

Since March 29, 1979, our bank has been undergoing the standard compliance review and investigation with respect to its affirmative action program and its personnel policies and practices.

This review is now well into the third year, and to date the bank is yet to receive approval of its affirmative action program.

Our bank welcomes the opportunity to relate its experiences to this subcommittee because it feels that the compliance review and the investigation have become harassing, and we would like to highlight some of the problems that it has confronted as a relatively small employer subject to OFCCP regulations.

After the first 3 frustrating months of trying to comply with numerous requests from the agents of the OFCCP, we found it necessary to retain the services of Mr. Gregory Utken of a labor relations law firm in Indianapolis to assist us in the compliance review.

We have been requested to supply the OFCCP agents with voluminous and meaningless statistical data and were told by these agents to recruit officers and officials of our bank from Louisville, Ky.; Detroit, Mich.; Cleveland, Ohio; out of the State of Virginia; and out of the State of Alabama.

To date our bank has spent 3,790 man-hours and $87,000 in cash. Not included in these calculations are the time spent for labor counsel, legal fees, supply costs, and miscellaneous expenses.

The CHAIRMAN. What do you estimate those additional expenses to be?

Mr. HILL. Senator, that would probably add another $17,000 or $18,000, which would make it exceed $100,000. The $87,000 we can document.

There has been absolutely no recognition by the OFCCP of the fact that our bank is a small employer in a small city. At no time was any recognition given to the time that might be involved in meeting OFCCP demands or to the costs involved in meeting their demands.

We feel that in a very real sense the OFCCP has taken over the direction of the personnel function of the bank by coming in and telling it what records to keep, how to keep the record, where we can recruit our personnel, how to write its job descriptions, what type of interviewing system it should use, what type of salary and wage program should be instituted, what type of job evaluation forms and systems it should use, and what types of personnel decisions should be made.

Throughout all this time the bank has been cooperative; we have acted in good faith and literally submitted to each demand placed upon us.

Each month we have kept expecting the affirmative action program to be approved, but instead we receive greater lists of deficiencies and informational requests. Each time the requests have become larger.

The bank has asked itself: What is the justification in requiring a small employer like NBG to spend close to $100,000 and 4,000 hours of time to meet administrative regulations in a routine compliance review when it has never been charged with employment discrimination nor has there ever been any evidence that any of its employment actions have been discriminatory.

The OFCCP compliance review and investigation of our bank appears to be a classic example of swatting a gnat with a sledgehammer.

I would turn the remaining time I have, with your permission, Senator, over to Mr. Wilson Hurrell.

The **Chairman**. All right.

Mr. **Hurrell**. Mr. Chairman and members of the committee, I am Wilson Hurrell, vice president of the National Bank of Greenwood. Certainly I am happy to appear before this committee.

At the very beginning of my comments, which are shortened, I must reiterate that our bank is not questioning the basic thrust of the fair employment laws. Rather, we are seriously questioning the necessity and the validity of regulations that have burdened us with the aforementioned man-hours—almost 4,000—$90,000 in costs, reams of reports and documents that would measure three or four feet in height if they were stacked one on another, and direct governmental intrusion into a small private business.

There are certain problem areas covered in our written statement that I would like to expand on in just the short time I have before the committee, and I believe I can address these problems accurately as I participated in each and every meeting and segment of this unbelievable review process.

First is the labor market area. Mr. Hill has already outlined the bank, its size, and its community. Our community and service area has a small minority population of about 1.4 percent, and we are some distance from viable minority recruitment sources within the Indianapolis SMSA.

Initially the OFCCP demanded we use the SMSA or our program would never be approved. After some debate the OFCCP agreed to let us use our eight-township service area. This area generates 87 percent of our applicant flow statistics and is the residence of 98 percent of our employees.

One reason for clinging to this labor market of the eight townships was and is obvious: That if we agreed to the Indianapolis SMSA we would never reach the resulting goals and timetables and we would be chastized by OFCCP for being deficient in the utilization analysis of minorities and females.

Employment specialists, I would like to point out, with the Indiana Employment Security Division completely agreed with our position on this matter.

In addition I found it hard to believe that on one occasion the OFCCP specialist directed us, as Mr. Hill pointed out, to recruit in such areas as Virginia, Louisville, Detroit, and other States.

My response to that comment was immediate in reminding him that we were a community bank not a regional banking center having farflung recruiting activities throughout the whole United States.

Finally, on an annual basis we must write the specified recruitment sources advising them of our EEO posture. When employment openings occur we again contact them for assistance in filling the vacancies. This we have been doing but with poor results.

One agency wanted us to take a person who could not speak English for a public contact job within our bank, but when the agency realized our location it simply said, "That's too far away; none of our people would drive that far to accept employment with your bank."

Interestingly, all minorities on our staff were obtained through inside employee referrals or walk-in applicants. Not a single minority has been successfully recruited through suggested OFCCP sources.

The second area is technical and information demands from OFCCP. We are amazed at the ever changing demands of that agency for statistical data, general format, job groups, language, recruitment areas, the eight-factor analysis. For 2½ years it has been like a river, always moving, always shifting, always changing; it never stays the same.

In our last meeting with OFCCP on July 7 of this year once again we were told to change job groups. We had reached agreement on this matter last year.

Three employees were shifted—just three—affecting five job groups: the work force analysis, the utilization analysis, and finally the goals and timetables.

Incredibly, 3 days later the specialist who requested that change in turn questioned our resulting statistics. In 3 days she had forgotten that she had requested the change.

Our continuing concern is that in the future as different specialists review our affirmative action program they will demand changes based on their own opinions. Hence it becomes a never ending process of change.

The third area is the eight-factor analysis. This has been a nightmare of statistical maneuvering. We were not advised of the weighting system until well into our first year of the review.

The regulations, as you know, call for an analysis of eight factors for minorities and females but do not mention a weight factoring system. One percent is to be spread among the eight factors with a maximum weight—this was the weight we were directed to use—of 0.225 assigned to any one factor.

We diligently analyzed the factors, used the weights as directed, but could never satisfy the Agency. In utter frustration we agreed to use two factors of the Indianapolis SMSA to speed the acceptance of our program. Still the Agency refused to accept our final availability analysis.

Eventually the OFCCP did the analysis for us. That was the first technical assistance we really had, but it was on a take-it-or-leave-it basis. They used weights as high as 0.95. We were directed never to do anything of that nature. Again we followed instructions only to find them changed at the will of the OFCCP.

The final result of indiscriminate and arbitrary use of the weighting system skews or bloats the availability figures provided by the official census data. Statistical weighting then can put a contractor in a deficiency utilization posture, which may not be the case at all.

From the small employer status versus burdensome regulations throughout this unbelievable and frustrating review I have been appalled at the OFCCP and the attending regulations as they place a backbreaking burden on an employer to reach compliance status.

We have alluded to the cost and volume of paperwork required and now need to focus on the time frames. As an example, in the letter from OFCCP dated November 21, 1980, additional information was requested concerning previous and current employee histories as far back as 1945.

I was given 2 weeks to reply to that letter, and when I did reply the material was 11 inches thick—and I had 2 weeks. Bear in mind that it is just myself and my secretary. We did not get a reply from them in turn until April 6, 1981—4 months later. Similar examples abound.

Our written statement discusses Senator Richard G. Lugar from Indiana's attempt to help us gain program approval. Incredibly, the Senator's letter of January 16, 1981, did not receive a reply until June 15, 1981—6 months later.

If the OFCCP does not respond to a U.S. Senator why should it respond in a reasonable fashion to a small bank?

The CHAIRMAN. I have a feeling they are going to respond in the future.

Mr. HURRELL. The last area I would like to comment on is governmental intrusion into a private business—taking over the personnel function of a bank.

As of July 7, 1981, we were directed to do the following: conduct a detailed analysis of job descriptions and specifications by January 1, 1982; utilize specified recruitment sources and contact them by letter, telephone, or personal contact within 30 days of AAP approval; develop a score interview rating form and review the form every 90 days; develop physical and mental job qualifications within 30 days of program approval; develop a skills inventory for all employees within 90 days—I know all the employees personally—I do not need a skills inventory; I have got it—develop a formal wage and salary program by January 1, 1982; develop a formal career counseling program within 90 days of program approval; and on and on.

As a small employer we do not have highly structured lines of progression, and that just sent them into orbit; we do not have them.

With regard to progression lines into higher paying jobs, nor do we generate promotions, transfers, new hires, termination data, personnel activities to the extent of meaningful statistical analysis. I refer to the impact analysis on page 12 of our written statement.

Again, we are talking about a small employer's personnel function, not the Bank of America or General Motors. Our personnel function is not and need not be complex or a highly technical system.

Granted, some of the suggestions would be nice to have but impractical to implement. NBG's personnel department, as I mentioned, consists of myself and one full-time secretary, and we also perform other duties in addition to personnel such as purchasing.

In summary, we at the National Bank of Greenwood reflect on the past 2½ years with utter dismay. Time and again we have been told our affirmative action program approval was imminent—just 2 weeks away. That was last July—July 1980.

Our current specialist congratulated us on our AAP efforts and also thanked us for the kind and considerate treatment she received while doing an onsite review.

We have always been fair, open, and cooperative in our relationship with OFCCP and have never denied or falsified information.

Just for the record, there has never been a claim of discrimination filed against the bank, nor did the OFCCP uncover complaints from the employees it interviewed. We certainly are not perfect, but neither are we guilty of discrimination. Why then must we first be judged guilty of possible discriminatory practices then be expected to prove our innocence? Are we not innocent until proven guilty?

Lastly, is it reasonable for a regulation to apply equally to all Federal contractors having 50 or more employees? The impact of the regulation on our business is tremendous. However, a business the size of NBG cannot afford the luxury of hiring a full-time EEO specialist or put its personnel system on computer for instant analysis and information retrieval.

Many small banks are watching our situation with great concern because they feel they cannot cope with the technical requirements of the revised order.

As one bank official told me, "We are living in fear of the day OFCCP calls on us for a routine compliance review." That bank also does not have a personnel function on a full-time basis.

I deeply appreciate the opportunity to relate our experience to you. The story of our compliance review is factual and needs to be told. I hope the committee grasps the seriousness of our situation and can see its way clear to initiate action that would remove or cushion the problems that have been outlined. We at the National Bank of Greenwood and many other employers will be forever grateful.

Thank you.

The CHAIRMAN. Thank you.

Mr. Smithwick, I think you are our final witness here today, and I am running out of time. I would like to start you. I may have to leave, but I am going to ask Mr. Florez of my staff to finish the testimony. Then what I would like to do is submit questions in writing to all of you and would like to get them back as quickly as possible because I think what you have been saying today is very, very important. We have just got to do something about this.

You are representative of thousands of businesses large and small that have had this type of harassment, all in the interest of paperwork and not in the interest, in many respects, of helping the people that the agency was designed to help.

Mr. Smithwick, let us start with you. If you will forgive me—all of you—for having to leave, we will submit our questions in writing.

STATEMENT OF JOHN W. SMITHWICK, SENIOR VICE PRESIDENT, FIRST AMERICAN BANK OF NASHVILLE, ACCOMPANIED BY ANN B. EWERS, VICE PRESIDENT AND MARGARET BELL, HUMAN RESOURCES OFFICER

Mr. SMITHWICK. Mr. Chairman, I am John W. Smithwick, corporate human resources director and senior vice president of First American Corp., located in Nashville, Tenn.

With me today is Ms. Ann B. Ewers, vice president of First American Corp.; and Margaret Bennett Bell, human resources officer of First American.

It is a privilege for us to be here today. Speaking in behalf of our entire board and management, I would like to say that we are indebted to the committee for giving our organization the opportunity to voice our concerns, frustrations, and—yes—our indignation with respect to our experiences with the Office of Federal Contract Compliance Programs.

Having heard the similar experiences of these individuals and companies testifying here today I feel that we are not only in a Senate Chamber but perhaps also an echo chamber.

At the outset let me stress our corporation's total support for affirmative action and the full range of measures necessary to make equal employment opportunity a reality.

My written testimony documents our actions in the area of affirmative action. I will not dwell on it today, for I believe it stands on its own. However, I would like to highlight some of our experiences during the compliance review, and I would like to outline our objections to the existing programs with corresponding recommendations for the future.

At First American we place a heavy emphasis on the bank's commitment to human resources. Our objective has been to communicate not only the spirit but the letter of affirmative action both internally and within the surrounding community.

Why our organization was selected for review we do not know. To the best of my knowledge, this notice of an intent to audit did not result from any individual or class complaint for no alleged violation had been filed with this agency. We assume that the bank received its notification as a result of the agency's decision to target the banking industry under what we believe to be the widely publicized assumption of industry wide guilt.

The bank's overall positive program of affirmative action commitments appeared evident from the material provided to the agency during the desk audit. In fact, our desk audit materials revealed that First American had already achieved over 98 percent of its goal in achieving parity between its work force and the total availability of minorities and females.

Nevertheless, the length of our compliance review, the fact that it is still ongoing, and the sequence of events following the desk audit illustrate the futility in communicating our good faith efforts achievements to this agency.

Despite the bank's obvious accomplishments in preparing and implementing its plan, the agency presented First American with a list of alleged deficiencies upon completion of its audit. Our management and board were completely shocked when they reviewed this list. It gave the impression that minimal effort had been given to equal employment opportunity or affirmative action.

However, after we reviewed the list of alleged deficiencies, it became evident that they were generalities copied word for word from the OFCCP manual. It was a clear use of standard boilerplate language rather than an individualized assessment of First American's actual status.

It is significant to note, however, that the bank responded in detail to each one of the alleged deficiencies, explaining the bank's position on each issue. This was done even though the major portion of the response material had already been included in our desk audit material.

One of the major areas which they cited was our failure to give adequate support to local or national community action programs designed to improve employment of minorities and females and to establish meaningful and productive relationships with these groups.

In my written material I have submitted a page and a half, which is a summary of many cases of both meaningful and productive relationships we have in the community with organizations. I will not go into them today.

In another area, even in programs where the bank had accomplished significant achievements in such functions as training and development—which the OFCCP noted as superior to others they had evaluated—and internal promotions—which through our job posting system had produced such results as black females making up the highest proportion of promoted individuals in 1979—the agency demanded that we develop a skills inventory in order to bring us into their definition of compliance.

I remind you again that we had accomplished already 98 percent of parity.

To reiterate, these points are just examples of the majority of alleged deficiencies and suggested remedies listed by the agency which were merely opinions on ways to enhance programs already in effect, rather than actual areas technically deficient or lacking in First American's total affirmative action efforts.

The **Chairman**. Mr. Smithwick, I am going to have to leave at this point. I am going to ask Mr. Florez to continue the testimony and make this record. This record is a very, very important record, as you can easily see; and we will have, I think, very stimulating hearings again tomorrow.

We are going to keep holding these hearings until we get to the bottom of these problems, and we are going to try to help you people as well as help minorities, women, and handicapped people in this society. I have read your statement, but I will have to leave right now.

If you will forgive me, we will submit questions to each of you, and we hope you get them back as soon as you can. Thank you.

We appreciate your coming in here. If you find 1 ounce of harassment or mistreatment as a result of your guts in coming in here and testifying, I want to know about it immediately.

Mr. **Florez** [acting chairman]. Jack, would you continue?

Mr. **Smithwick**. Thank you.

During the audit process, the agency requested vast quantities of records and data. In response to its request the bank's personnel found it necessary to review over 7,000 employee personnel files.

The scope of the data requested and the short deadlines for responding imposed by the agency required First American to pay over $7,000 for temporary help, over $35,000 in computer expenses, and over 4,000 man-hours by members of the personnel staff alone, at a payroll cost in excess of $45,000. This does not include the cost and time expended by senior management, our attorneys, and the board of directors in reviewing and responding to this audit.

In short, over the past 12 to 15 months an outlay of over $90,000 was required in an effort to work with this agency in spite of its unreasonable demands. This cost to the bank is far beyond the estimated annual cost of approximately $50,000 in computer expenses, payroll costs, and other expenses directly related to our efforts to comply with the reporting requirements of the Executive order.

Most of these inordinate expenditures of time and money could have been avoided had the agency's representatives not made repetitive requests for the same data and imposed unreasonably short deadlines for compliance. A sense of disorganization and unprofessionalism on the part of the agency pervaded the entire process.

In our discussion today, we originally intended to omit any reference to the individual actions of our particular compliance officers, for we were reluctant to generalize their actions as being indicative of OFCCP's staff.

However, from conversations with the other banks represented here today, we have noted similar conduct on the part of other OFCCP compliance officers; therefore, we feel it may be appropriate to comment on our experience.

There was clearly an adversarial role on the part of the OFCCP's staff from the onset of the audit. Their preconceived presumption of guilt was obvious.

Without going into great detail, but as an example, the fact that their compliance officer, during the first few days of our onsite review, stated to one of our black branch officers—totally unsolicited, and a remark which we totally disagree with—that "it would be 500 years before a black was ever in senior management at First American." This was completely unwarranted and indicative of the unprofessional and adversarial attitude surrounding our audit.

I have given you these facts to illustrate the nature of the audit itself and its scope. I remind you that this audit was not initiated by a complaint of noncompliance. I submit that the efforts put forth to accommodate the agency during its compliance review far outweigh the results produced.

Despite our firm belief that most, if not all, the deficiencies asserted by the agency on October 9, 1980, were unreasonable and unfounded, our representatives met repeatedly with the OFCCP in an effort to resolve these matters and to bring our review to a conclusion.

Through this negotiating process, all alleged deficiencies and issues have been resolved with the OFCCP with the exception of that which asserts the existence of an alleged "affected class" of a group of individuals hired into one particular job classification at the bank. This alleged deficiency appeared for the *first* time in the *final* list of deficiencies submitted in October of 1980.

These individuals were classified by the bank as an "affected class" based on the allegation that the bank "failed to take affirmative action to insure that employees are treated during employment without regard to race with respect to the placement, upgrading, transfer, and selection for training."

The OFCCP initially requested that all present and former employees hired into this classification since 1967 receive back pay representing the difference between the salary received by them in their present position and the salary they might have received had they been employed in a higher job classification. They also requested front pay for these individuals until they assumed their "rightful place."

We have not discriminated against any group of employees. Each has had full and equal access to the positive affirmative action efforts of the bank.

Despite every reasonable effort by the bank to resolve issues raised by the agency's audit it has taken an unreasonable and untenable position on the alleged "affected class" by a blanket rejection of the bank's compelling evidence refuting its claims.

The agency dismissed our responses and arguments as "errors in logic" and simply "unacceptable" in the letter to First American in May 1981.

In response to the allegations of discriminatory job placement, the bank presented the fact that the majority of the individuals had applied for the specific position that into which they were hired.

With respect to upgrading, we have pointed out that since 1977, the bank has had in effect a job posting system whereby job vacancies are listed to afford all employees an opportunity to bid on them.

Since that system was instituted, all individuals in the alleged affected class who posted for higher level positions have been promoted.

Prior to the job posting system bank records indicate that at least seven employees in this position requested and were subsequently granted higher level positions. Indeed, our records indicate that no alleged affected class member who has seriously pursued advancement has failed to receive a promotion.

The availability and results of the posting process were communicated to the agency during submission of the original desk audit material over 1½ years ago. However, to our amazement, they continued to allege that this group of employees was locked into their positions and that the bank had simply instituted a neutral practice of posting rather than taking affirmative action.

The agency also alleged that the bank had failed to take affirmative action with regard to training for these persons. The bank's internal training program and external tuition refund program were again found to be neutral rather than positive affirmative programs.

All of our employees are made aware of its availability and are encouraged to participate. In 1980 the bank spent over $125,000 on these programs.

It is our opinion that the agency's position on the alleged "affected class," including both back and front pay remedies, is totally unsupported by the facts or as a matter of law.

Totally aside from the legal question as to whether the agency can or should seek and obtain monetary relief from a contractor under the Executive order, their position that the mere presence of a number of individuals of a particular racial identity in a certain job category can be considered as proof of an absence of affirmative action is, on its face, logically unsound and legally indefensible.

After consideration of our repeated submission of statements explaining and defending our position, the OFCCP has acquiesced on only one point. They finally conceded that, by their own regulations, the maximum period of time any member of this alleged "affected class" would be due backpay was 3 years, rather than 13 as they initially asserted.

On all other points, they have rejected the bank's refuting evidence without logical arguments to the contrary. This rejection has made any further negotiations futile.

We have finally concluded that, as a matter of principle, we will not give in to these arbitrary and unreasonable demands. It would certainly be less costly from a time and monetary standpoint to offer some sum of money and sign a conciliation agreement just to conclude this audit which has now been going on for more than 16 months.

If we had believed the bank to be wrong, we would not be here. We would have agreed to make anyone whole who had been wronged. However, this is not the case.

We are proud of our record in promoting affirmative action. We do not intend to let our record be tarnished through the conduct of this agency which can only be described as bureaucratic blackmail.

The bank has attempted to resolve the affected class issue by offering to institute an accelerated training and career counseling program and to alter the requirements for our tuition refund program just for the employees in this category. In fact, we have already put this program into place.

However, this approach has been rejected by the local office of the OFCCP, which has advised the bank that our file will be sent to the regional office with a recommendation for enforcement proceedings unless we agree to their remedy of back and front pay.

This is where we stand today, facing the possibility of debarment as a Government contractor in spite of our sincere, and largely voluntary, efforts to implement a total program of affirmative action which goes far beyond either the spirit or the letter of the law.

Based on our experience, we join the U.S. Chamber of Commerce in its appeal to Secretary Donovan to participate in a thorough reexamination of affirmative action audits conducted by the OFCCP on a cost-benefit basis.

I can personally testify that First American's human resources program development during the past 12 months has been less positive and progressive as a result of this compliance review.

Furthermore, several new programs we had planned to implement during the year were delayed due to the allocation of resources required to deal with this agency's audit. The bank certainly would have preferred spending this time and money addressing positive internal and external programs.

We feel that the possibility of debarment as a Federal contractor, which we construe to be "corporate capital punishment," for failing to comply with minor, bureaucratically created technicalities without any evaluation of, nor credit for, its entire affirmative action effort, is totally unproductive and, more importantly, a severe detriment to the spirit and intent of the Executive order.

We would like to see the Department of Labor utilize its resources from a more positive reinforcement standpoint by rewarding positive actions rather than following the process of negative reinforcement and presupposed guilt or, as in our case, of squandering its supposedly limited resources.

We suggest perhaps the deferral of followup audits for a set period when a contractor has demonstrated good faith compliance with affirmative action goals.

I will not go into our other recommendations because they have certainly been echoed by the other individuals here today.

In summary, on behalf of First American Corp., I would like to express our deep appreciation for this opportunity to communicate our frustrations and disappointments in dealing with the OFCCP.

Instead of the professional, businesslike approach we had come to expect from agencies such as the Comptroller of the Currency and the Federal Reserve Board, we encountered illogical adherence to unsupported positions, redundant requests for information, obvious lack of understanding of materials actually provided, and a process which, at best was unproductive and, at worst, a total waste of both the agency's and our own resources.

We hope that as institutions like ours, who are represented here today, can stand together and offer alternatives to this audit process, affirmative action programs can become a more positive and constructive means of insuring the continued progress toward advancement of all qualified individuals, but particularly minorities, females, and the handicapped.

Thank you.

Mr. **FLOREZ**. Thank you, Jack.

For the record, I would like to ask a couple of questions of each of the participants.

I want to go back to Senator Hatch's point where he was saying that he thinks it is great that finally business people are standing up and saying what the problems have been. We have heard here that no one is against affirmative action but you are against the regulations that are now being enforced by the regulators.

A couple of themes have come through here today and one is the no-win regulations and the presumption of guilt under which everybody starts.

Steve, I think you put it well—the extortion apparently comes then: "If you don't comply here, we'll just escalate it." You only went through 18 months; Bob, you are still going through it 3 years later. You pointed out earlier to me that if OFCCP cannot get a small company of 150 people together how effectively can they enforce other corporations. Why were you selected as a company to be reviewed?

Mr. **SMITHWICK**. We think it probably has something to do with targeting the banking industry, but it was interesting that about a year into our process one of our EOS's stated to us that if they had known we were not the largest bank in Tennessee we probably would not have been audited at this time.

Mr. **FLOREZ**. So they made a mistake—you were not the biggest?

Mr. **SMITHWICK**. That is right. We hope to be in the very near future, however.

Mr. **FLOREZ**. Mr. Hill, as a businessman with your current experience with OFCCP, what kind of an attitude do you now have about affirmative action?

Mr. **HILL**. Well, I think we have a positive attitude toward affirmative action. We have nothing against an affirmative action program at all.

The basic attitude or the feeling you develop because of the attitude of the people of the OFCCP—it would be very easy to develop a negative attitude. Because of that you would be prone to simply say, "Well, I don't want anything to do with it," and throw it out the window.

In retrospect, I think it would have been a lot simpler for us, for example, had we initially known what we know now, to have solved our problem. What we simply would have done would have been to have our board of directors pass a resolution severing our relationship with the Treasury Department in the issuance and redemption of savings bonds, which is a loss-leader anyway and a costly operation which our industry has subsidized all these years. We would have refused to accept the receipt of tax moneys for deposit in our bank also. That would have solved our problem. Then we would have had no reason to come under the program.

But our board of directors felt that even though we are a small bank we were not going to let a bureaucracy of the Government push us around. They said, "We are going to fight even if we have to go all the way to the Supreme Court."

As some of the other witnesses have said today, it certainly would have been much more constructive had we been able to take $100,000 and put it to constructive use rather than throw it down the tube to comply with a lot of meaningless things from the Office of Federal Contract Compliance Programs.

Mr. FLOREZ. Thank you.

Mr. Glenn, you get around on the west coast quite a bit in your business activities, I understand.

Mr. GLENN. Yes.

Mr. FLOREZ. Would you say yours was a unique experience with OFCCP, or is this characteristic of what goes on out there?

Mr. GLENN. I think the experience we had at Bank of the West is not a unique one. For the last 2 years I have chaired the California Bankers Association's personnel committee. In the course of committee meetings and meetings with other banks and institutions I found a number of organizations which were having similar kinds of difficulties in dealing with the Agency.

Mr. FLOREZ. Thank you.

What I would like to do is to continue to give you the written questions so you can submit the answers for the record. I think it is terribly important that we begin making this sort of record.

Unfortunately, we have not heard from the business community; and, as the Senator said, he is pleased to see the business community finally coming forward.

If we are going to solve this question in America, it is not going to be solved simply by throwing stones at each other, but it is a matter of pulling together: And I think the business community now is standing up and saying, "We would like to participate and do something about it."

Without objection, those questions and your prepared statements will be inserted at this point.

[The prepared statements of Mr. Glenn, National Bank of Greenwood, and Mr. Smithwick, and the questions and responses referred to follow:]

TESTIMONY OF
STEPHEN C. GLENN, SENIOR VICE PRESIDENT
BANK OF THE WEST - SAN JOSE, CALIFORNIA
BEFORE THE
UNITED STATES SENATE COMMITTEE ON
LABOR AND HUMAN RESOURCES
HEARINGS ON
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

WASHINGTON, D.C.
JULY 29, 1981

Good morning (afternoon). My name is Stephen Glenn. I wish to thank you for this opportunity to speak with you on the subject of the Office of Federal Contract Compliance Programs, specifically the compliance review that has just been completed at Bank of the West.

By way of introduction, I am a Senior Vice President of Bank of the West and am speaking as a representative of this bank. My responsibilities include those of Director of Human Resources and Corporate Planning. Bank of the West is a State chartered commercial bank with offices ranging from San Francisco, our corporate headquarters, to Newport Beach. The majority of our branches are located within Santa Clara County, in and around San Jose, California. Our bank employs approximately 1,150 people.

I would like to stress at this point that Bank of the West fully supports the concept of Affirmative Action and providing equal employment opportunities for all protected class members. This commitment runs from the top of the bank down through all levels of management. Each manager at Bank of the West is evaluated as part of his or her performance appraisal on the results of his or her Affirmative Action efforts, and the results of those efforts show in the statistics and progress of the protected class members of the bank.

In the period from 1975 through to 1980 the results of these efforts clearly show in the statistics. For example, total minority employment at the bank rose 64% during that period from 15.3% to 25.1%. This compares with an available labor force in our market area of

20.6% minorities based on California Employment Development Department statistics for Affirmative Action programs. Minorities in officials' and managers' jobs during that same period of time increased 155% from 6.5% to 16.6%. This compares with an approximate available labor force based on EDD statistics of 14.5%.

During that same period women in the bank also have fared very well. The number of women in officials' and managers' positions increased 57% from 28.8% to 45.3%. This compares with an available labor force of approximately 36.9% based on May 1980 EDD statistics.

The OFCCP throughout the review of Bank of the West has never focused on the real results of the programs that have been in place in our bank for several years. This causes us some significant concerns regarding the regulations that have been promulgated to interpret and enforce Executive Order 11246, the manner of their enforcement and the impact that they are having on the banking industry, and specifically our institution.

A compliance review was initiated at our bank by the San Jose office of the OFCCP on December 17, 1979. That compliance review was closed July 7, 1981 (subject to acceptance of our letter of commitment). Tha bank had spent through June 16, 1981, a total of 3,498 man hours on this review, with a total cost of labor, computer time and programming, legal and consultant fees, and Xeroxing expenses directly related to this review in excess of $83,350.[1] Throughout this process, the OFCCP has been unable to find any significant deficiencies of any kind in our bank. There was never a question of an affected class, discrimination, underutilization or lack of progress toward goals and timetables. We were even told by OFCCP[2] that the bank had an excellent reputation with minority agencies and community groups for working with them.

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[1] See Exhibit I - Cost Breakdown

What I would like to do for the Committee is read William Gladden, Assistant Regional Administrator's letter closing the review, and to recount some of the events that have occurred in the course of this review which have generated a significant level of frustration on the part of management of the bank, resulted in incurring significant expenses on the part of both the bank and the agency, and have provided no meaningful or tangible results of any kind.

First of all, Mr. Gladden's letter which is attached to my testimony as Exhibit II, is the final result of the review of our bank. (See Exhibit II.) The bank's letter of commitment is attached as Exhibit III. Historically, this is how the review proceeded:

On December 18, 1979, we received the OFCCP's standard letter requesting the desk audit information data, with the data to be provided to the OFCCP before or no later than January 17, 1980. We asked for and received an extension of one week from the date that the material was requested.

The bank routinely prepared the data requested in the desk audit letter and then had that information reviewed by the bank's legal counsel, the firm of Jackson, Lewis, Schnitzler & Krupman, who specialize in labor and EEO law. We were advised by legal counsel that our package of requested data was in compliance with the OFCCP regulations. The bank then on January 18, 1980, attempted to submit the requested desk audit information. When the information was delivered to the OFCCP offices, the agency refused to accept the data and called us to request that we not submit it at that time. The rationale for their refusal appears to have been a 60-day time frame under which regulations state they were required to complete the review. They indicated they had not planned to start the review prior to January 25, 1980, and asked us to resubmit the data on that date.

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[2] Conversation with EOS Luevano, 10:45 A.M., 4/30/81; telephone conversation with area office director Cordova, 5/18/81, 9:30 A.M.

I point this out because I feel that the time pressures the agency is under to complete the review may have impacted the decision that was later made to issue a show cause letter to the bank.

We then resubmitted the package of information on January 25, 1980, as requested by the OFCCP. On February 6, 1980, we received a phone call from the person who had been assigned to the bank review, Mr. Angel Luevano, who asked us to set up a meeting to discuss and clarify some of the desk audit information. He indicated that he had some concerns as to whether or not the desk audit submission was reasonable. The bank scheduled a meeting for February 8, 1980, with Mr. Luevano, the bank's attorney Mr. Cronin, myself, and Mrs. Lois Larson, the bank's Affirmative Action officer. This meeting lasted approximately two hours.

At this initial meeting we explained the computerized format of our AAP in detail, and discussed the organizational structure of our bank. Mr. Luevano discussed the possibility of issuing a show cause letter, and stated that this would also eliminate the 60-day time clock problem. We reviewed the plan in detail, with our attorney outlining how it complied with the regulations. Mr. Luevano indicated he had some concerns about the appropriateness of the bank's job groupings, but conceded that he had never reviewed a bank, and was unfamiliar with the jobs, their content, and the industry. At the conclusion of the meeting we had the impression that we had answered his questions and that it would not be necessary for the agency to issue a show cause letter.

The next contact from the OFCCP was receipt of a show cause letter on February 20, 1980. Five working days had elapsed since our meeting with Mr. Luevano and February 18, the date the letter was sent.

I noted the amount of time that was spent with the bank in discussing these issues, and the amount of time elapsed, because in a later OFCCP communication[3] and conferences[4], they stressed the extensive amount of time spent in negotiating with the bank prior to the issuance of a show cause letter.

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[3] Cordova's April 22, 1981, letter to McKenzie Moss, page 2, paragraph 4.

[4] Meeting, 3:00 to 4:30 P.M., 5/26/81, with Cordova, Luevano, Oroz, Moss, Glenn, Cronin, Bank of the West Board Room, San Jose, California.

This show cause letter erroneously described the bank's work force analysis and job grouping, and stated that it was unacceptable.

The bank met with Luevano and his supervisor Mr. Oroz, on February 22 (2 days after receipt of the letter) and explained the same information we had covered in our meeting on February 8, 1980. We explained that the OFCCP had erroneously described what we had submitted, which they conceded.

On March 27, we received a letter from Mr. Luevano stating that the OFCCP had completed the desk audit and was coming onsite to complete the review. (Exhibit IV.) The letter included a request for a substantial amount of information within 10 days (which allowed only 7 working days). It should be noted here that the bank was consistently required to incur significant overtime expense and work staff weekends to meet the unreasonable time frame deadlines imposed on it by the OFCCP.

Throughout this review the OFCCP utilized its power to request information and reports as a vehicle to harass the bank. A listing of the information and reports the bank supplied the agency is included as Exhibit V. The agency was well aware of this tactic. In a meeting on March 31, 1980, the first day of the onsite, Mr. Luevano told me they had several discussions in their office before coming onsite and were pressuring to see how much information they could collect from the bank.

There were many other examples of this technique during the next three weeks while the OFCCP was onsite. For example, on April 22, 1980, in a meeting with Mr. Luevano when we asked why the review at Bank of the West was taking so much longer, and was requiring us to generate so much more information than any other bank in the State, he told us the following: He stated that he had not found any serious problems, that he was just very thorough in his approach. He said that he had reviewed the work done at Crocker, Wells Fargo and Bank of America by the San Francisco office, and while he did not like to talk down his own agency, those reviews were performed in an inadequate fashion and would have been unacceptable to him or the San Jose office. He went on to state, rather proudly, that he had earned a reputation in his previous reviews as being difficult to deal with and taking an adversarial approach toward the contractors he was reviewing. He said he didn't know why this was so, perhaps it was just his nature.

He stated further that if he really wanted to be difficult he could ask us for information going back to 1972 or even 1968, but that he didn't intend to in our case as we were cooperative. He also explained that he was a law school graduate, and though he wasn't an attorney he had a good deal of the Title VII litigation experience from his previous employment. His message was clear - if we objected to his tactics he could make it more difficult and expensive for us.

During the three weeks of this first onsite we were required to spend hundreds of man hours reproducing manually information that was computerized, and completing statistical analysis that should have been done by the OFCCP staff.

On the final day of this first onsite (4/24/80) we were advised by the EOS (Luevano) that he had found no serious problems. He went on to say that he would have a meeting that afternoon with his superiors to discuss the Bank of the West review and determine the agency's course of action. At 4:00 P.M. that afternoon I received a phone call from Mr. Luevano who indicated that he had some bad news: the OFCCP had decided to amend the original show cause and found the bank's Affirmative Action program unacceptable and unreasonable. This decision, he said, was based on our job groupings. He stated that he was working on drafting the amendments to the show cause letter and we would receive them within two weeks (the bank never has received an amended show cause notice).

Our next contact from the OFCCP came 11 weeks later on July 9 when we received a letter from William Gladden, Assistant Regional Administrator in San Francisco. His letter (Exhibit VI) stated that our AAP was too seriously deficient to conduct a desk audit, and they were ready to pursue enforcement. This was despite the fact that they had previously advised us in writing that they had completed the desk audit and they completed an onsite review. (See Exhibit IV.)

At the conciliation conference held on July 30, 1980, the bank and our attorneys met with Mr. James Southard, Chief of Operations for the regional office; Mr. James Chen, also from the San Francisco regional office, and Mr. Luevano. The meeting focused on the bank's job groupings. The bank pointed out that the definition of job groups in the regulations was in parenthesis and required that jobs of similar content, compensation and opportunity be grouped together. (Exhibit VII.) We argued to no avail that our present grouping met this test. We also cited several banks and savings and loans that this region had recently reviewed and approved with the same job grouping as Bank of the West. (We reviewed Xeroxed copies of the Plans with the agency.)

We noted that the OFCCP had approved this format in the widely published Chase Manhattan Conciliation Agreement[5]. We provided copies of the proposed regulations for the banking industry that OFCCP had published at the time our bank developed its AAP calling for the same format we provided (these were later withdrawn). (Exhibit VIII.) We also provided a copy of the agency's Policy Issuance ARA 78-17/60-1 directed specifically at contractors with previously approved automated reporting formats. (Exhibit IX.) We were advised that all of these facts were not relevant to our case. (We were later told by Mr. Luevano on April 30, 1981, that at this time the region had 29 other approved plans with our salary grade based types of job grouping.)

We asked OFCCP if we changed our format and reprogrammed the computer would it be acceptable for our next review. We were told by Mr. Southard that if we changed our job groups this time there could be no assurance that they would be approved in future reviews. Mr. Chen reviewed our utilization analysis and commented that with 900 people the bank showed a very small number of underutilized job groups; therefore if we are that much in compliance, our job groupings must be inappropriate. After threats of enforcement action, the bank conceded to amend its job groups, and revert from an automated program to a manual one for monitoring progress. We were given 5 days to revise our job groups and submitted a proposed grouping on August 5, 1980.

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[5] Page 6, Chase Manhattan Conciliation Agreement with OFCCP.

We advised the agency that we would provide a revised AAP within 30 days of approval of our job groups. When we had heard nothing by September 8, 1980, I wrote Mr. Southard to determine our next course of action (Exhibit X) and offered to submit a revised program at their convenience. I received a response from Mr. Cordova of the San Jose office on September 15, 1980, stating that they could not give prior approval to job groups and that our revised AAP was late. We hand delivered it the same day. That was the last we heard from the San Jose office until March 9, 1981, when we received a phone call from Mr. Luevano. Six months had elapsed.

During that period I contacted Rachel McKinnon of the San Francisco regional staff twice to inquire of the status of our review. She advised me on December 2, 1980, that she would contact Mr. Luevano and have him report back to me. Mr. Luevano told me on April 27, 1981, that she did contact him and ask him to call me, but that his superiors told him not to. I only mention this because I feel it's another indication of the agency's attitude throughout the review.

We received a letter from Mr. Cordova on March 24, 1981, advising us of another onsite review and requesting voluminous information, while allowing only 9 working days to complete it. (Exhibit XI.)

Another onsite review was initiated April 27, 1981, and concluded in one week. Again, the agency was unable to identify any significant problems.

We were then presented with a draft of a conciliation agreement and were told that we could conclude the review by signing it. It covered the areas impacted by the revised job groups. (Exhibit XII.) Mr. Luevano also conceded that the 18 months spent on the review had had no real bottom line impact on the bank's Affirmative Action posture.

On May 14, 1981, the bank responded to the San Jose office with a letter of commitment that addressed all of the issues in the conciliation agreement. (Exhibit XIII.) (It should be noted that all of these changes had already been implemented.) This was accompanied by a legal opinion citing its appropriateness prepared by bank counsel and delivered to Mr. Oroz and Mr. Luevano. They indicated surprise at the bank's response.

I received a phone call from Mr. Cordova on May 18, 1981, who indicated that he was surprised that the bank wouldn't sign the conciliation agreement. He questioned why we wanted to challenge their (OFCCP's) procedures. He said he would not accept a letter of commitment and would move to enforcement. He indicated that if the bank did not sign the conciliation agreement it could cost us another $74,000 and stretch out another year and a half, possibly 3 years.

He stated that he was having his staff re-analyze our data "to make sure they had not overlooked any problems". He said they would do a "thorough" offsite analysis to attempt to detect additional deficiencies in the bank's AAP. He also noted this would not be necessary if we signed the conciliation agreement.

He compared our review to the Firestone case, one he had initiated in Texas. He said while OFCCP had lost the case, he personally viewed it as a victory as it helped clarify the rules. He also noted it took several years and cost a great deal of money. He then requested a meeting with McKenzie Moss, the bank's President, to make certain he understood the implications of not signing the conciliation agreement.

On May 26, 1981, a meeting was held at the bank with Messrs. Moss, Cordova, Oroz, Luevano, Cronin (bank's attorney) and myself. Mr. Cordova reviewed the case and consequences of not signing the conciliation agreement. Mr. Moss noted that his presentation appeared to be a threat, and the discussion became somewhat heated. During the discussion, when asked about some specifics in the bank's letter of commitment, Mr. Cordova said that he had not personally read it (it was addressed to him); that it was still being processed by his staff (Oroz and Luevano). He also said that he had not personally reviewed the bank's AAP.

Mr. Cordova stated that the matter was now out of his hands; that we could talk to Mr. Gladden (Assistant Regional Administrator) if we wished.

I telephoned Mr. Gladden's office that afternoon to set up a meeting, and again the following day. Neither call was returned. A meeting was eventually set up through Mrs. Sanchez of Congressman Norman Mineta's staff. It took place on June 16, 1981.

The meeting of June 16, 1981, took place in Mr. Gladden's office in San Francisco. In attendance at that meeting from the bank were Mr. Edouard Finot, Chairman; McKenzie Moss, President; Lois Larson, Asst. Vice President and Affirmative Action Officer; Frank Cronin, bank counsel, and myself. Mr. Gladden was present as was Ms. Lucille Hearne, a member of the OFCCP staff.

During the meeting we reiterated the concerns that we had as to the manner in which the bank's compliance review had been conducted and the tactics that were being used by the San Jose office in their review of Bank of the West. Mr. Gladden, during this meeting, indicated that from the file he had on the bank he was unable to determine if an onsite review had even been conducted. He said that he had been briefed on the bank's review by Mr. Luevano and had instructed him to go back and to amend the show cause letter identifying some substantive issues as nothing in the case presented thus far was of any substance. We requested that Mr. Gladden carefully review the material that had been previously submitted and take a look at the original package that had been submitted by the bank.

We were contacted by the OFCCP on Thursday, June 25, 1981, when Ms. Hearne called to indicate that Mr. Gladden, after reviewing the case, had determined that the original show cause letter had been erroneously issued, they later determined that we had "shown good cause", and that the San Francisco region was willing to rescind it. A meeting was set for July 7 to negotiate a letter of commitment closing the review.

This whole process has now consumed over 18 months, almost 3,500 man hours, and cost Bank of the West $83,350. The bottom line is that the bank's basic Affirmative Action efforts have remained unchanged, there have been no additional employment opportunities created as a result of this exercise, there have been no findings of discrimination on the part of the bank, no one has really benefited from this review in the least. It has cost the bank a great deal of money and I trust that the Government has spent an inordinate amount of money and time on one review that focused only on technical minutiae, while it seemed to overlook the basic concept and purpose of an Affirmative Action program: to provide employment opportunities for protected class members.

Thank you very much for allowing us to share with you some of the recent frustrations that we have experienced as a result of our compliance review.

(Note: In the interest of economy, the exhibits supplied for the record by Mr. Glenn were retained in the files of the committee where they will be available for research upon request.)

UNITED STATES SENATE

LABOR AND HUMAN RESOURCES COMMITTEE

SUBCOMMITTEE ON LABOR

Statement By The National Bank of Greenwood
Greenwood, Indiana
On Its Experiences With The Office Of
Federal Contract Compliance Programs

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July, 1981

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CONCERNS OF THE NATIONAL BANK OF GREENWOOD

GREENWOOD, INDIANA

REGARDING THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS ACTIVITIES

Statement Prepared For The United States Senate Committee On Labor And Human Resources

July, 1981

A. Background.

The National Bank of Greenwood (hereafter NBG) was chartered in 1934. It is located in Greenwood, Indiana, a city of approximately 20,000 people located in Johnson County, Indiana, fifteen (15) miles due south of Indianapolis, Indiana. NBG is a medium sized bank with assets approaching 117 million dollars. It employs approximately 145 people and consists of a main office and three branches, all of which are located within three (3) miles of the main office. It services customers in the 6 townships comprising Johnson County and 2 townships in southern Marion County, located immediately north. It does not service Indianapolis, other townships in Marion County (the county in which Indianapolis is located) or any other counties. See map on page 8-a.

NBG prides itself on being an equal opportunity employer and has vigorously followed and applied personnel policies without regard to race, sex, religion, national origin, veteran status, and age or handicap as defined by law. It is fundamentally committed to these concepts and it has had an affirmative action program since 1976 (prior to its coverage under EO 11246).

The Chairman of the Board is Allan P. Dreyer and the President is Robert W. Hill. Due to the relatively small size of the Bank, it does not have a formal personnel department, rather, Wilson Hurrell, a Vice President, acts in the personnel capacity and has one secretary working with him. However, his duties include many other areas besides personnel.

Since March, 1979, NBG has been undergoing a standard compliance review and investigation with respect to its affirmative action program (hereafter AAP) and its personnel practices and policies. Apparently it was selected on an "at random" basis for the compliance review. This review is now well into its third year, and to date, the Bank is yet to receive approval of its AAP.

NBG welcomes the opportunity to relate its experiences to this Subcommittee because it feels that the compliance review and investigation have almost become harassing and it would like to highlight some problems that it has confronted as a relatively small employer subject to the OFCCP regulations.

B. Overview Of The Compliance Review.

1. 1979

The Bank was notified by letter in March, 1979 that the Office of Federal Contract Compliance Programs (hereafter OFCCP) had selected it for a compliance review. The agency requested that it submit its AAP's for review. NBG submitted its 1978-79 AAP's shortly thereafter and since that time it has been seeking the OFCCP's approval of the program. On numerous occasions since then, agents of the OFCCP have verbally represented that if certain information was submitted the program would be approved.

In June of 1979, the OFCCP sent a letter to NBG stating that its AAP was not in compliance and issued a show cause notice listing 1/2 page of deficiencies. In July of 1979, NBG submitted additional information and modifications to meet the listed deficiencies. In August of 1979, the OFCCP finished reviewing the material and modifications submitted by NBG and stated that there were still "some" areas of concern before the AAP could be approved. During this time period, representatives of the OFCCP had visited the Bank and indicated that the AAP could be approved after submission of some statistical analyses. (Also, during this time period, the Bank retained the management labor law firm of Roberts, Ryder, Rogers & Neighbours in Indianapolis to assist it in the compliance review.)

However, on September 24, 1979, the same representatives visited the Bank and said that the AAP could not be approved because there were several other problems. They requested the statistical analysis and AAP modifications before the end of the month, so that the AAP could be approved before the end of their next reporting period (September, 1979). On September 26, the Bank's labor counsel submitted some of the requested information. On October 1, 1979, the Bank submitted the requested statistical analyses as well as a job code listing in the format requested by the OFCCP representatives.

Instead of obtaining approval, on November 26, 1979, the OFCCP notified NBG that the AAP was not in compliance. It then issued a new letter listing deficiencies covering 3-1/2 pages. Four days later, the Bank received deficiency notices for the Vietnam Veteran and Handicap AAP's. In December of 1979, the Bank forwarded voluminous modifications of its AAP, again seeking to comply with the OFCCP's deficiency list. At this time, the Bank requested approval of its AAP as had been previously promised.

2. 1980

In June, 1980, six (6) months later, the OFCCP, rather than sending its approval, notified the Bank that additional voluminous information must be submitted concerning current employees. The Bank complied with this request late in June of 1980. However, instead of obtaining approval of its AAP as it expected, on July 22, 1980, it received a letter from OFCCP announcing that it would be conducting an on-site compliance review of the Bank and that a new agent had been assigned to the case. Between July 24 and July 29, 1980, an on-site review was conducted. During this visit the representative was permitted to review payroll records, personnel records, and interview both employees and supervisors of the Bank. During an exit interview afterwards Bank President Robert Hill, specifically asked when approval of the AAP could be expected. The OFCCP agent stated "within 2 weeks".

On August 5, 1980, OFCCP sent yet another letter to NBG, this time listing an additional four (4) pages of deficiencies with the

AAP. On August 14, 1980, the agency sent a follow-up letter requesting yet additional information on former and present employees. Late in August, the Bank submitted another revised AAP, again responding to the deficiencies listed in the August 5 letter. Instead of receiving the much awaited approval, the OFCCP sent NBG a letter stating that the AAP was not acceptable and submitted three (3) more pages of requested changes.

On October 9, 1980, NBG submitted the requested changes per the OFCCP's earlier letter. However, on November 6, 1980, it was notified that the AAP was not yet acceptable. On November 10, the Bank sent OFCCP yet another modification of its AAP. It had been verbally represented to the Bank that with the submission of this material it would be "just a matter of days" before the AAP would be approved. Incredibly, on November 27, 1980, the OFCCP notified the Bank that the program would not be approved because there were further deficiencies. Later that month, the OFCCP sent two letters to the Bank, the first of which detailed in six (6) pages, additional information needed concerning former and present employees and the subsequent letter requested further information. These turned out to be the largest informational demands made on the Bank since the March, 1979 commencement of the review.

On December 17, 1980, the Bank once again met the OFCCP's demands and forwarded the additional information. At the same time it again requested that its AAP be approved as had been represented to the Bank several times in the past.

3. 1981

Approximately four (4) months later, the OFCCP responded to the Bank's December, 1980 submission, not with approval of the AAP, but with another request for information covering two (2) pages. On May 7, 1981, the Bank submitted the information.

In late June, 1981, the Bank received a telephone call from OFCCP requesting a meeting at the agency's offices. Representatives of the Bank met with the OFCCP representatives on July 7, 1981. At this time, the OFCCP stated that there were still some technical deficiencies in the AAP and that there were potential "impact" areas with respect to some of the Bank's past personnel actions. The agency asked the Bank to make some modifications in the AAP and to address the "impact" areas in the AAP. The Bank's labor counsel asked to have the deficiencies and requests for modifications in writing. However, the OFCCP refused stating that it would only slow down approval of the AAP and the regional office would force the district office to require the Bank to sign a conciliation agreement. The agency represented that if the Bank would submit the modifications within the next three weeks, it would not be required to sign a conciliation agreement and if all the modifications were proper, the Bank would receive approval of its current AAP. The agency also indicated that it would do a follow-up review within a year or two. A detailed chronology of the correspondence and meetings between NBG and OFCCP is attached hereto as Exhibit A.

Although NBG has experienced numerous problems in the course of this compliance review, it would like to highlight the specific major problem areas that it encountered.

C. Specific Problem Areas.

1. Statistical Area

From the outset, the OFCCP insisted that the statistical area the Bank should use for its calculations be the Indianapolis Standard Metropolitan Statistical Area (SMSA). This consists of Marion County (the location of Indianapolis) and its 7 contiguous counties, Morgan, Hendricks, Boone, Hamilton, Hancock, Shelby, and Johnson Counties. NBG is located in Johnson County. See page 8-a.

The Bank took the position that the statistical area to which it should be compared was that containing the 8 townships which it served. NBG spent several hundreds of dollars in obtaining the census tract statistical information for these 8 townships from the National Planning Data Corporation in Ithaca, New York. In support of its position, the Bank conducted a study of the residence of its employees which revealed that 98% of its labor force was from the 8 township area and only 2% was from other counties in the SMSA. Additionally, the Bank conducted a study of the residence of its job applicants. This study showed that 87% of the individuals who applied for jobs at NBG were from the 8 township area. Despite this showing, the OFCCP continued to insist that the appropriate statistics were those of the Indianapolis SMSA.

The Bank felt that the statistical base to which it would be compared in the future should not only should be accurate, but realistic. The OFCCP appeared to be concerned only about making the minority and female statistical base as large as possible, regardless of the circumstances. In fact, one representative of the agency stated that the Bank had to use that statistical area which would produce the highest percentage of minorities.*

The Bank remained steadfast in its position since there was quite a difference between the percentage of minorities in the labor force in the Indianapolis SMSA (12.9%) as opposed to the eight township area (1.4%) that the Bank actually serviced and from which it draws most of its employees and job applicants. To use the Indianapolis SMSA figures would realistically mean that the Bank would never reach any of the goals required to be set by the OFCCP because they would be artifically high. Therefore, in the future NBG would constantly be found deficient and would have to justify why its statistics did not meet those goals. As explained later, the Bank, under protest, agreed to compromise its position and use the Indianapolis SMSA statistics for certain purposes.

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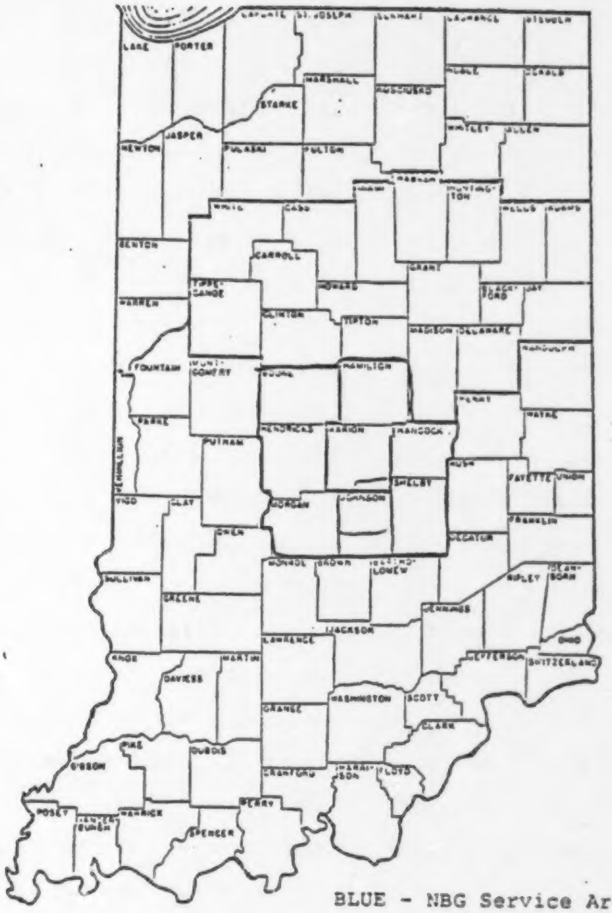
* In a similar vain, when discussing the recruitment area for bank officers and officials, the same OFCCP agent told NBG to recruit in Louisville, Detroit and in Virginia. NBG stated it wasn't a regional bank. The agent said that made no difference because those were some areas where a great number of minorities could be found.



BLUE - NBG Service Area and
Labor Market

RED - Indianapolis SMSA

2. The Eight Factor Analysis

A source of much confusion and conflict between the Bank and the OFCCP and had to do with the "eight factor analysis" for utilization of minorities and females. Under this analysis, the Bank was to (1) take each of the enumerated eight factors, (2) determine the percentage of minorities and females in the appropriate statistical area for each of the factors, (3) assign a value weight to each of the factors, (4) multiply the percentage of minorities or females by the value weight, and (5) then add the weight, and (5) then add the resulting eight figures to arrive at an availability percentage. This was to be done in 12 different job groups for minorities and for females. The Bank was given a document explaining the somewhat complicated formula. It was told that for each job group it should look at the eight factors and rank them according to their order of importance in filling the job. Then it was told to assign a value weight to each of the factors from a high of .225 to a low of .05. These value weights were to total 1.0. The Bank spent many hours going through the tedious process of analyzing each of the 12 job groups, looking at the 8 factors, ranking them and assigning a value weight. It then arrived at availability analysis.

However, this analysis was rejected by OFCCP because the Bank used the 8 township area rather than the Indianapolis SMSA. That dispute has been outlined above. The Bank subsequently agreed to use SMSA statistics for certain of the 8 factors. It then re-did the calculations and submitted its modified availability analysis. All this occurred under the direction of the first 2 OFCCP agents.

Six months later, when a new agent was assigned to the case, she rejected the analysis as improper. The Bank pleaded that it followed the previous instructions to a "T", but was informed they were wrong. The analysis was redone but again rejected on the basis that the OFCCP disagreed with the assigned weight values. It informed the Bank which factor (5) should have the greatest weight placed upon it and also what that value weight should be. Thus, it made no difference how NBG realistically ranked the factors and assigned the weights and the time spent doing that was wasted. When the OFCCP was asked why factor 5 had to be ranked highest and given the greatest weight, the response was "because that is the one with the greatest percentage of minorities". In some instances it suggested a value weight of .5 on a factor. This was more than double what the Bank had been previously been told was the maximum value weight (.225). The Bank agreed to modify its analysis and resubmitted it. However, it was again rejected because the OFCCP felt that the final availability figure for minorities and females should be equal to or approximate the fifth factor.* This was the factor with the greatest percentage of minorities or females as well as the one ordered to carry the heaviest weight. The Bank then inquired through its labor counsel, why go through the charade of an eight factor analysis when as far as the OFCCP was concerned the bottom line was that the availability figure should equal the highest percentage of minorities or females among the eight factors. No response was given.

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* The 5th factor is "The availability of minorities or females having requisite skills in an area in which the contractor can reasonably recruit".

Ultimately, the OFCCP prepared its own eight factor analysis and submitted it to the Bank on a take it or leave it basis. The Bank agreed to the OFCCP final availability figures, under protest, only in an effort to gain approval of its AAP. Perhaps the greatest amount of time in this entire experience was devoted to disputes on the eight factor analysis.

The Bank was further dismayed by the lack of consistency or intelligible technical guidance in performing the analysis. In addition to the examples cited above, the Bank was initially given a set of forms by the OFCCP to use in conducting the eight factor analysis. Subsequently, a representative of the Bank went to the OFCCP's office for technical assistance in performing the analysis. When he arrived he was notified that he had the wrong forms and was given a new set. Before the afternoon was out and he had left the offices of the OFCCP he was given yet a third set of forms to use.

3. Job Groups

One of the requirements of the regulations is that the Employer list its employees by job groups. The first OFCCP agents indicated that it was appropriate to do this by the standard EEO-1 categories. The Bank did this and then redid it several more times due to disagreements by the OFCCP concerning whether some employees were placed in the proper job groups. The job group listing was finally done to the satisfaction of the first OFCCP agents.

Six months later, when the new agent was assigned to the case, she listed as one of the major deficiencies failure to have appropriate job groupings. The Bank was now told that grouping strictly by the EEO-1 categories was not proper. The job groupings were redone according to new instructions. Again, the groupings were redone several times due to disputes concerning proper placement of certain jobs.

This aspect of the AAP has finally been done to the satisfaction of the OFCCP, but only after the Bank performed the groupings no less than 8 times. A natural result of each of these changes was that every time the job groups changed, the eight factor analysis had to be redone. This was in addition to the instances that the analysis had to be recalculated as described in Section B2 above.

4. Impact Analysis

Most recently, on July 7, 1981, the Bank was informed for the first time that it had to perform an "impact analysis" of personnel actions including applicant flow, hiring, promotions, training, and terminations. Again, the analysis was to be performed for each of the 12 job groups for both minorities and females. It was told that in each case the minority or female selection or participation rate should be at least 80% of that for non-minorities or males. To the extent that it was not, it was to be identified as a problem area and the Bank had to justify why it had not met the 80% rule. Due to its small size and therefore the relatively few personnel actions that take place in a year, the Bank felt that such an analysis would be meaningless. Yet the OFCCP required that it be performed. The Bank conducted this impact analysis for both minorities and females in each of the five areas by the twelve different job groups and in 115 of the 130 calculations performed the percentage was 0. The obvious reason for this was the fact that either no personnel actions took place, or so few did that the figures were totally meaningless. However, the Bank was required to go through this futile exercise.

5. Volume Of Informational Requests

Perhaps one of the biggest areas of concern to the Bank was the seemingly unending deficiency notices and voluminous informational requests. The Bank received no fewer than 6 deficiency notices and 7 informational requests. One would normally expect that these deficiency notices and informational requests would begin with large and general inquiries and that they would progressively become smaller. However, the Bank's experience was exactly the opposite. The first deficiency notice received covered one-half of a page. But they subsequently grew to 3-1/2 and 4 pages. The same was true for informational requests. Initial requests were relatively small and manageable, however, after two years into the compliance review, the Bank received its largest request ever covering 6 pages.

Additionally, the volume and type of information requested was burdensome. Among the information requested for employees (past and present) was race; color; sex; date of hire, position, salary, and qualifications on date of hire; current position, salary, and training; employment history including all jobs held and all pay raises; pregnancy histories; descriptions of all jobs held by the employee; a listing of minimum qualifications for all jobs held by the employee; attendance records; job applications; and job evaluations.

6. Voluminous Recordkeeping

With the advent of its coverage under Executive Order 11246 and of the compliance review, the Bank became enmeshed in detailed recordkeeping requirements. It found itself being required to keep detailed records including: names, addresses, and positions applied for by all job applicants; a listing of all job offers made by name, race, and sex; a listing of all new hires by name, race, and sex; listing of all transfers by name, race, and sex; a listing of all training by name, race, sex and type of training; a list of all terminations by name, race, and sex. These records were required to be maintained for each of twelve job groups.

Also, the Bank had to keep detailed records of all recruitment efforts, including records of any telephone conversations with recruitment sources.

In addition to these recordkeeping requirements, the OFCCP made further proposals in the area of personnel, which included rewriting of all job descriptions; the creation of a formalized wage/salary program; a scored interview for job applicants; and conducting a skills inventory for all minority and female employees.

7. Time Delays

Another item that disturbed the Bank was the gross inequities in time frame requirements. Whenever the OFCCP requested information or issued a deficiency notice, it demanded that the information be submitted or that deficiencies be corrected within 5, 10 or 15 days, depending on the size of the request or notice. In each instance, the Bank worked diligently and long hours to put the information or modifications together and submit it in a timely fashion. Occasionally it had to request an extension of time for one week. However, once the information was submitted to the OFCCP, it would often be 4 to 6 months before the Bank would hear from the agency again.

This non-chalance in responding to the submissions of the Bank was further evidenced in the agency's action after the Bank sought Senator Lugar's assistance in the matter. The Senator's office sent a letter to the OFCCP on January 16, 1981 inquiring about the reasons for delay in the approval of the Bank's AAP. It was not until June, 1981 before any response was submitted to the Senator and then it was perfunctory and non-responsive.

6. Temporal and Monetary Costs

To date, the compliance review has been very expensive to NBG in both time and money. Since the inception of the review, NBG Vice President Hurrell has maintained a record of hours spent by the Bank in working on the AAP/OFCCP review.

In 1979 (March to December), 1,815 hours were spent; in 1980, 1,671 hours were spent; and in the first 6 months of 1981, 304 hours have been spent. This totals 3,790 hours in 2-1/2 years.

This translates to approximately $65,000 in salary and wages paid. If the cost of fringe benefits is added (35¢ for each dollar) an additional $22,000 was spent, for a total of $87,000.

Not included in these calculations are the time spent by labor counsel, legal fees, supply costs and miscellaneous expenses.

D. Conclusion

Throughout this experience, NBG has found that the OFCCP zealously pursues the technical requirements of its voluminous regulations and the Bank does realize that many of the requirements and reports do serve a valid purpose. However, there has been absolutely no recognition of the fact that the Bank is a small employer in a small city. At no time was any recognition given to the time that might be involved in meeting OFCCP demands, or to the costs involved in meeting the demands. The simple fact that the Bank has jumped through each of the hoops raised by the OFCCP has made little practical or real difference vis a vis its equal employment opportunity posture. It is interesting to note that in the past two years the Bank's minority complement has increased from one employee to six employees and not a single one of those minorities came through affirmative action requirements.

Quite simply put, the standard order from OFCCP was "this is what the regulations require, you haven't done it, so do it". It's only goal seemed to be--how busy can we keep Mr. Hurrell and other employees at the Bank putting together information reports, statistical analyses, and goals.

In a very real sense, the OFCCP has taken over the direction of the personnel function of the Bank by coming in and telling it (1) what records to keep, (2) how to keep the records, (3) where to recruit, (4) how to write its job descriptions, (5) what type of interviewing system it should use, (6) the type of salary and wage program that should be instituted, (7) what type of job evaluation forms and systems should be used, and (8) what types of personnel decisions should be made. Certainly, many of the requirements or suggestions of the OFCCP would be good for a top-flight personnel function. we are sure that these are the type of things that large employers like General Motors, AT&T, or IBM use in their personnel system. However, it seems that there should be some recognition of a balancing of the costs of establishing and maintaining such a personnel function in a facility with less than a 150 employees.

Since at least September, 1979, a series of verbal representations have been made to the Bank by representatives of the OFCCP that with the submission of this information, or that chart, or this document, approval of its AAP was imminent. In each instance, the Bank diligently and in good faith provided the information or made the modifications requested in hopes of receiving that approval. In many cases, the Bank did not agree with the requirements and made the modifications under protest. As of today, July 29, 1981, that approval has not yet been received.

While the Bank understands the reasonable interest of the federal government in reviewing affirmative action efforts and programs, it does not understand why an employer of it size must be subjected to numerous, voluminous, and burdensome demands that have required the expenditure of thousands of manhours and thousands of dollars. It is particularly disturbing to the Bank since there has never been an employment discrimination charge filed against it in its history. Furthermore, the OFCCP has forced the Bank to submit to scrutinization of almost each and every employment decision ever made on each of its employees. The Bank has supplied all of this information and although it was recently told to look at some "problem areas", it has never been notified that any of its practices or actions with respect to any employee were ever considered discriminatory. In fact, after the July, 1980 on-site review the OFCCP investigator complemented the Bank for its affirmative action efforts. Most recently, in July, 1981, the Bank was told that no backpay or any other corrective action would be sought.

Throughout all of this, the Bank has been cooperative, acted in good faith, and literally submitted to each demand placed upon it. Each month it kept expecting its AAP to be approved, but instead, received only greater lists of deficiencies or informational requests. Each time the requests become larger.

The Bank has asked itself, what is the justification in requiring a small employer like NBG to spend close to $100,000.00 and 4,000 hours of time to meet administrative regulations in a routine compliance review when it has never been charged with employment discrimination, nor has there ever been any evidence that any of its employment actions have been discriminatory? The OFCCP compliance review and investigation of NBG appears to be a classic example of swatting a nat with a sledge hammer.

While NBG hopes that it is finally reaching the end of its odyssey, it is left cold by the prospect of going through this experience again within a year or two during a follow-up review, which the OFCCP already has suggested.

EXHIBIT A

TO THE STATEMENT BY THE
NATIONAL BANK OF GREENWOOD

NATIONAL BANK OF GREENWOOD
GREENWOOD, INDIANA
CHRONOLOGY OF CORRESPONDENCE AND EVENTS WITH THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

The following chronology does not reflect the numerous phone conversations between NBG and OFCCP in which many other changes or modifications were requested.

1. March 29, 1979

   OFCCP letter to NBG notifying it that the Bank has been selected for compliance review, listing twelve types of records OFCCP will want to review.

2. April/May, 1979

   OFCCP representatives Stafford and Malott visit NBG. Review records, make informational requests.

3. June 21, 1979

   OFCCP letter to NBG stating that material submitted not in compliance--show cause notice issued administrative action threatened. Lists 1/2 page of deficiencies in affirmative action program.

4. June 26, 1979

   OFCCP sends NBG another show cause letter, covering same thing as 6/21/79 letter, but signed by different OFCCP representative.

5. July 24, 1979

   NBG submits information in compliance with 6/79 show cause deficiencies.

6. August 14, 1979

OFCCP letter to NBG stating that it has completed review of NBG submissions pursuant to the show cause letter. States there are still some areas of concern and announces plans to conduct on-site investigation including reviews of files and records sometime in August.

7. September 11, 1979

NBG meets with OFCCP representatives Stafford and Malott at the Bank. Discuss AAP. They tell NBG that after statistical availability analysis is submitted, AAP should be approved.

8. September 24, 1979

NBG retains labor counsel (Roberts, Ryder, Rogers & Neighbours, Indianapolis, Indiana) to assist in matter. NBG again meets with OFCCP representative Stafford and Malott. They make information requests, and state there are several other problem areas that will have to be addressed before AAP can be approved. Also, urge Bank to submit before end of month so AAP can be approved before the end of their next reporting period. (September 30, 1979).

9. September 26, 1979

NBG's attorney sends letter to OFCCP (Mr. Stafford) submitting requested information and noting confusion in different instructions given by OFCCP on statistical analysis. Also expresses surprise that affirmative action program would not be approved due to several other problems. Stafford had represented that program would be approved after submission of statistical analysis.

10. October 1, 1979

NBG attorney letter to OFCCP submitting modified statistical calculations and complying with OFCCP requests on certain weighing factors. Also enclosed is job code listing per request. Numerous hours spent in preparing data, all information prepared in accordance with Stafford and Malott instructions.

11. November 26, 1979

OFCCP letter to NBG finding that NBG affirmative action program is not in compliance despite the fact it has submitted information per their request--amended show cause order issued with new 3-1/2 page list of deficiencies. Original letter of 6/21/79 lists only 1/2 page of deficiencies.

12. November 27, 1979

OFCCP letter to NBG from Stafford confirming that NBG is observing the factor weighing system but finding other alleged deficiencies in NBG's application of the system.

13. November 30, 1979

OFCCP letter to NBG notifying it that affirmative action programs for handicapped and Vietnam veterans are unacceptable, requests corrections.

14. December 28, 1979

NBG attorney letter to OFCCP with voluminous modifications of affirmative action program per OFCCP's request in 11/26/79 letter. NBG asks for approval of AAP as previously indicated.

15. January 3, 1980

NBG attorney letter to OFCCP complying with deficiency notice of 11/30/79 re: handicap and veteran AAP.

16. January 31, 1980

OFCCP letter acknowledging NBG letter of December 28, 1979 stating that materials will be reviewed.

17. June 3, 1980

Six (6) months after NBG submits information in 12/18/79 letter, OFCCP sends letter announcing that additional information must be submitted with respect to current employees of the Bank including race, sex, initial hire date, position and salary, qualifications at the time of hire, current position and salary, and training provided. Letter requests information be submitted within two weeks and announces that Mary Till has now been assigned to the case.

18. June 23, 1980

NBG attorney letter to Till at OFCCP submitting the requested information on all current employees.

19. July 22, 1980

OFCCP letter to NBG announcing on-site compliance review for two or three days. Enclosing list of fourteen types of records to be reviewed by OFCCP.

20. July 24-29, 1980

On-site review conducted. Mary Till allowed to review payroll and personnel records and interview employees and supervisors. During review, Till informs NBG that the statistical analysis and job code listing are done incorrectly. NBG informs Till that her predecessor Stafford and Malott had instructed NBG to perform analysis in that fashion. She instructs Bank to change them.

21. August 5, 1980

OFCCP letter to NBG with four-page listing of deficiencies to be corrected. Deficiencies different than those listed in previous letters. Requests modifications within two weeks.

22. August 14, 1980

OFCCP letter to NBG with additional informational request on former and present employees. Requests information within ten days.

23. August 29, 1980

NBG attorney letter to OFCCP enclosing revised affirmative action program.

24. September 25, 1980

OFCCP sends NBG letter saying AAP not acceptable, submits three more pages of requested changes.

25. October 9, 1980

NBG submits requested AAP changes (including new statistical analysis) per OFCCP 9/25/80 letter. Two days before, Till changes statistical request, mid-stream making such of submitted material which took numerous hours to complete totally meaningless.

26. November 6, 1980

OFCCP says NBG statistical analysis still not satisfactory. Requests revised information within five days. NBG told by Till that with submission of this modification, AAP would be approved within two weeks.

27. November 10, 1980

NBG attorney letter to OFCCP submitting yet another statistical analysis, following OFCCP directives and confirming statement by Till to NBG that with submission of these figures AAP would be approved.

28. November 17, 1980

OFCCP letter to NBG stating that program would not be approved finding further deficiencies and notifying NBG of additional data needed and records to be reviewed.

29. November 21, 1980

OFCCP letter to NBG with detailed six-page listing of additional information requested concerning former and present employees. Requests information within two weeks. Largest information request to date.

30. November 26, 1980

OFCCP letter to NBG requesting further information.

31. December 5, 1980

NBG contacts Sen. Lugar's office, requests meeting to review NBG's concerns over OFCCP actions.

32. December 17, 1980

NBG attorney letter to OFCCP enclosing additional requested information and requesting once again that AAP be approved as represented several times in past.

33. January 16, 1981

Sen. Lugar writes OFCCP inquiring as to delay and cost involved in approval of NBG AAP, and requests a reply.

34. April 6, 1981

OFCCP responds to NBG letter and information provided on 12/17/80 (approximately 4 months earlier). OFCCP requests two more pages of information. Also that it be submitted within two weeks.

35. April 16, 1981

NBG attorney writes to OFCCP re 4/6/81 letter requesting information on OFCCP procedures, why the AAP has not been approved as promised the previous year, and why more information is still needed.

36. April 29, 1981

OFCCP responds to NBG attorney's letter of 4/16/81. It states AAP will not be approved until audit of personnel activity is completed.

37. May 4, 1981

Sen. Lugar's office again writes OFCCP asking why it has not responded to his letter (1/16/81) of approximately 4 months earlier.

38. May 7, 1981

NBG submits additional information requested in OFCCP letter of 4/6/81.

39. May 8, 1981

NBG writes Sen. Hatch re its concerns with OFCCP.

40. June 15, 1981

OFCCP finally replies to Sen. Lugar's letter of January 16, 1981. States review is in process and thus there is no final determination on NBG AAP.

41. June 22, 1981

Sen. Lugar's office replies to OFCCP letter of 6/15/81. Notes that letter is non-responsive. Asks OFCCP to address issues raised.

42. July 7, 1981

NBG officials meet at OFCCP office at agency's request. OFCCP states there are still some deficiencies in AAP and potential impact areas in personnel activities. Asks bank to make changes in AAP and address impact areas. NBG attorney asks OFCCP to put deficiencies and requests in writing. OFCCP refuses, saying it would slow down approval of AAP. Requests modified AAP within three weeks.

43. July 28, 1981

NBG submits newly revised AAP to OFCCP for approval.

REMARKS GIVEN BEFORE THE
SENATE LABOR OVERSIGHT COMMITTEE
Washington, D.C. - July 29, 1981

Mr. Chairman and Distinguished Members of the Committee. . . . . I am John W. Smithwick, Corporate Human Resources Director and Senior Vice President of First American Corporation, which is located in Nashville, Tennessee. It is a privilege for me to be here today. Speaking on behalf of our entire Board and Management, we are indebted to the Committee for giving our organization, First American Bank of Nashville, N.A., the opportunity to voice our concerns, frustrations and, yes, our indignation with respect to our experiences with the Office of Federal Contract Compliance Programs (the OFCCP).

At the outset, let me stress our corporation's total support for affirmative action and for the full range of measures necessary to make equal employment opportunity a reality. We are confident that our record bears out this support. When a government agency uses powers vested in it by Congress in a negative and unyielding way and, more importantly, in a way which is inconsistent with the original intent of its mandate, we feel compelled to bring examples of this waste and abuse to the government's attention.

We feel this is also in keeping with the attitude of the current administration which has committed to eliminate abuse and waste of government resources in order to improve not only the productivity of government but also to stimulate the overall economy.

Let me also emphasize that, up to this point, our institution has always maintained close and cooperative relations with all of its regulators. As a national bank, we are subject to extensive examinations by government agencies. However, in contrast with our experiences with the Office of Federal Contract Compliance Programs, I would like to point to our examination process with the Comptroller of the Currency. The regular examinations by the Comptroller of the Currency have become events which our Board of Directors and Management welcome as an evaluation of our progress within the Banking Industry. Our ability to receive constructive comments from professional examiners and to discuss freely with them both problems and potential solutions has been of much help to us. We feel this is an excellent example of the role government can play in not only monitoring but also assisting industry. Unfortunately, neither this professionalism nor this appropach was present in the OFCCP examination.

I have divided my comments into three sections. First, I would like to briefly give you some background information on First American Bank of Nashville, N.A., and its efforts in the area of affirmative action. Secondly, I would like to highlight our experiences during the compliance review. And thirdly, I will outline our objections to the existing program with corresponding recommendations for the future.

First American Corporation is a bank holding company, the "lead" bank of which is First American Bank of Nashville, N.A. The Bank has assets totalling 1.4 billion dollars and employs 1400 persons. As you can see, we are not a major money center bank, neither are we a small community bank.

At First American, we realize that our most valuable assets are our employees. During the 1970's, when the Bank underwent a dramatic shift in management and direction, we placed a heavy emphasis on the Bank's commitment to the human resources area. Our objective has been to communicate the "spirit" as well as the letter of affirmative acton and equal employment opportunity both to the employees and to the surrounding community. This prevailing spirit has not only been evidenced by significant monetary commitments by the Bank, but also by the involvement of management, the Board, and employees alike in activities both inside and outside our own organization.

A Training and Development Department was established in 1978 in order to insure maximum growth potential for all employees. A Tuition Refund Program was established in 1973 to reimburse employees who are seeking formal education which allows them to gain the skills necessary to advance. A comprehensive Job Posting System was implemented in 1977 whereby all employees would have the opportunity to be considered for available positions based upon their individual qualifications.

In 1978, First American began participating actively in the "Inroads" Program, which allows us to employ, guide, direct, and assist college-bound minority students toward careers in the corporate community. The annual cost to the Bank for this program is approximately $20,000. We are represented by executive management on the local and national boards of this organization, which is a highly innovative and results-oriented program. This program, one of the best-conceived in the nation, was featured in Business Week last year. The National Executive Director of Inroads, who is himself a member of a minority group, now serves on the Board of First American Corporation.

Our Management Training Program has received new emphasis as an excellent feeder group to entry-level management positions. The composition of our Management Training Program for the last four years has been as follows:

1978	Minority - 40.0%	Female - 60%
1979	Minority - 40.0%	Female - 80%
1980	Minority - 37.5%	Female - 50%
1981	Minority - 40.0%	Female - 40%

Through internal promotions and recruiting efforts, First American's minority and female representation has increased substantially in the Official and Manager and the Professional categories over the past ten years. This continuing progress has been reported on an annual basis to the Equal Employment Opportunity Commission.

I have mentioned these programs, which were implemented voluntarily, in order to give you just a few examples of how First American's spirit of equal employment opportunity has been put into action. This action-oriented emphasis on human resources development was the prevailing environment when we were notified by the OFCCP on March 3, 1980, that they planned to conduct a compliance review. Desk audit materials were requested in the initial notification for submission on April third.

Why our organization was selected for this review we do not know. To the best of my knowledge, this notice of an "intent to audit" did not result from an individual or class complaint, for no alleged violation had been filed with this agency. We assume that the Bank received its notification as a result of the OFCCP's decision to target the banking industry under what we believe to be its preconceived "assumption of industry-wide guilt" during 1980.

First American has in the past been, and continues to be, an active EEO/Affirmative Action Employer. The Bank's overall positive program of affirmative action commitments appeared to be evident from the material provided to the OFCCP during the desk audit. In fact, our desk audit materials revealed to the OFCCP that First American had already fulfilled 98.5 percent of its goal of achieving parity between its workforce and the external availability of minorities and females. Nevertheless, the length of our compliance review and the sequence of events following the desk audit illustrates our futility in communicating our good faith efforts and achievements to this agency.

Following submission of the desk audit materials to the OFCCP and prior to the on-site review, our Affirmative Action Officer and our attorneys evaluated our position to give us a forecast of what deficiencies, if any, might be found by the OFCCP during their review. Their preview reflected a tone of confidence based on First American's affirmative action accomplishments and the technical soundness of our Affirmative Action Plan. In developing the Affirmative Action plan submitted to the OFCCP, our Human Resources Department had obtained, at considerable cost, the most current availability statistics from National Planning Data Corporation, and had even obtained normally unavailable data from the Department of Education, in order to be as accurate as possible in the eight-factor analysis of our workforce which is required by current OFCCP regulations. These statistics were analyzed according to the recruiting area utilized for each job title in our workforce in order to arrive at our group statistics for comparison in the utilization analysis. First American also developed its own computer software package to analyze the data contained in our Affirmative Action Plan. After we had prepared our Plan analyses, one of the major Fortune 500 companies investigated the purchase of this software package because of its superiority to other existing programs. Our Human Resources Department has also acted as a consultant to other companies, including a major university, on similar programs.

Despite the Bank's obvious accomplishments in preparing and implementing its Affirmative Action Plan, the OFCCP presented First American with a list of alleged deficiencies upon completion of its audit of that plan. Our Management and Board were completely shocked when they reviewed this list. It gave the impression that minimal effort had been given to equal employment opportunity or affirmative action. However, after review of this list of alleged deficiencies, it became apparent that they were generalities copied word for word from the examples of deficiencies cited in the OFCCP Manual. It was a clear use of standard "boiler plate" language rather than an individualized analysis of First American's actual status.

It is significant to note, however, that the Bank responded in detail to each one of the alleged deficiencies explaining the Bank's position on each issue. This was done even though the major portion of the response material had been included in the original data submitted to the OFCCP during the desk audit.

Suggested remedies by the Nashville Office of this Agency included broad-based solutions as to what they focused on as existing problems. A prime example of this boiler plate approach is found in the OFCCP Area Director's letter to First American on October 9, 1980, in which he quoted the reference found in Title 42, Code of Federal Regulations, of the Bank's failure to "give adequate support to local and national community action programs designed to improve the employment of minorities and females." The OFCCP's recommended remedy included "establishing meaningful and productive relationships with business and community organizations established for the advancement of minorities and females." This alleged deficiency was listed even though, in the desk audit material, during the on-site review, and at the exit conference, First American had pointed out to the OFCCP most of the following accomplishments:

- First American had pledged to contribute $161,875 to organizations for handicapped, minority and female advancement during 1980 and that within this amount, $60,000 had been committed to Fisk University (a nationally known, predominantly black university located in Nashville) and to the United Negro College Fund.
- First American had reported 15 employees participating as Directors on boards of various organizations including the Urban League, Inroads, Opportunities Industrialization Center (the OIC), and various committees working with handicapped individuals.
- First American officers and directors have been leaders in the "Leadership Nashville" and the Davidson Group Project programs designed to achieve better working relationships among all ethnic groups in Nashville.
- First American had spearheaded the establishment of a minority recruiting agency in Nashville in conjunction with the Urban League.
- First American had been the recipient of a special commendation award from the Opportunities Industrialization Center.
- One of the Bank's directors was named "Man of the Year" by the Nashville Chapter of the National Conference of Christians and Jews in 1980.

- First American had received the Mayor's Award and the Governor's Award for assisting the handicapped as well as various other commendations for its efforts in promoting job opportunities for the handicapped.
- First American hosted, at its expense, innumerable luncheons and meetings involved with the advancement of job opportunities for handicapped, minorities, and females.

We have recently completed a survey of all officers requesting that they list their civic, social, and charitable involvement in the community. The results illustrated that a large number of First American's employees are involved in over 300 such organizations, including more than 60 organizations relating to minorities, community action, and handicapped individuals.

It was also noted that even programs where the Bank had accomplished significant achievements in such functions as Training and Development (which the OFCCP noted as superior to others they had evaluated) and internal promotion efforts (which had produced such results as black females making up the highest proportion promoted in 1979), the OFCCP demanded that the Bank develop a skills inventory to be implemented in order to bring the Bank into its definition of compliance. The OFCCP's remarks were in effect, "You have to do this because you are underutilized in minorities and females."

To reiterate, these points are just examples of the majority of the alleged deficiencies and suggested remedies listed by the OFCCP which were merely opinions on ways of enhancing programs already in effect rather than actual areas technically deficient or lacking in First American's total affirmative action efforts.

Even though our response to the various points of contention was explained to the OFCCP on numerous occasions, the Bank continued to respond to repeated requests for further data from May until October, when a final list of deficiencies was received. In order to demonstrate its "good faith" during the review process, the Bank agreed to certain modifications and/or revisions to its existing Affirmative Action Program despite its firm belief that asserted "deficiencies" were primarily without legal or factual basis. Several alleged deficiencies were simply minor technical violations such as the Bank's failure to have removed the sexist term "journeyman" which appeared in one job description out of almost 500. These revisions primarily consisted of "additional personnel practices," the majority of which the Bank had already planned for implementation in furtherance of its ongoing Human Resources Program objectives.

During the audit process, the OFCCP requested vast quantities of records and data. In response to the OFCCP's requests, the Bank's personnel found it necessary to review over 7,000 employee personnel files to retrieve the requested data. In light of the scope of the data requested and the short deadlines for responding imposed by the OFCCP, First American was required to expend over $7,000 for temporary help to comply with the requests, over $35,000 in computer expenses, and over 4,000 manhours by members of the personnel staff alone, at a payroll cost in excess of $45,000 in compiling, analyzing, and drafting response materials. This does not include the cost and time expended by Senior Management and the Board of Directors in reviewing and responding to the audit.

In short, over $90,000 has been expended over the past 12 to 15 months in an effort to work with this agency in spite of the unreasonableness of its demands. This cost to the Bank is above and beyond the estimated annual cost of approximately $50,000 in computer expense, payroll costs, and other expenses directly related to our efforts to comply with the reporting requirements and other regulations issued pursuant to the Executive Order. Most of this inordinate expenditure of time and money could have been avoided had the OFCCP's representatives not made repetitive requests for the same data and imposed unreasonably short deadlines for compliance with their requests. A sense of disorganization and unprofessionalism on the part of the OFCCP pervaded the entire process.

In our discussion today, we originally intended to omit any reference to the individual actions of our particular compliance officers, for we were reluctant to generalize their actions as being indicative of OFCCP's staff. However, from conversations with the other banks represented here today, we have noted similar conduct on the part of the OFCCP compliance officers and, therefore, we feel it may be appropriate to comment on our experiences.

There was clearly an adversarial role on the part of the OFCCP's staff from the onset of the audit. Their preconceived presumption of guilt was obvious. Without going into great detail, but as an example, the fact that their compliance officer, during the first few days of our on-site review, stated to one of our black bank officers - totally unsolicited, and a remark that we totally disagree with, that "it would be 500 years before a black was ever in senior management at First American" was completely unwarranted and indicative of the unprofessional and adversarial attitude surrounding our audit.

I have given you these facts to illustrate the nature of the audit itself and its scope. I remind you that this audit was initiated not by a complaint of non-compliance. I submit that the efforts put forth to accommodate the OFCCP during its compliance review far outweigh the results which were produced.

Despite our belief that most, if not all, of the deficiencies asserted by the OFCCP on October 9, 1980, were unreasonable and unfounded, our representatives met repeatedly with the OFCCP in an effort to resolve these matters and to bring their review of our Bank to a conclusion. Through this negotiating process, all alleged deficiencies and issues have been resolved with the OFCCP with the exception of the deficiency which asserts the existence of an alleged "affected class" of a group of individuals hired into one particular job classification at the Bank. This alleged deficiency appeared for the first time in the OFCCP's final list of deficiencies submitted to the Bank on October 9, 1980. These individuals have been classified by the OFCCP as an "affected class" based on the allegation that the Bank "failed to take affirmative action to ensure that employees are treated during employment without regard to race with respect to the placement, upgrading, transfer and selection for training." The OFCCP initially requested that all present and former employees hired into this classification since 1967 receive back pay representing the difference between the salary received by them in their present position and the salary which they might have received had they been employed in a higher job classification. They also requested front pay for these individuals until they assume their "rightful place."

We have not discriminated against any group of employees, particularly those in this specific classification. These employees have had full and equal access to the positive affirmative action efforts of the Bank. Despite every reasonable effort by the Bank to resolve issues raised by the OFCCP audit, the OFCCP has taken an unreasonable and untenable position on the alleged "affected class" by their blanket rejection of the Bank's compelling evidence refuting their claims.

The OFCCP dismissed our responses to their charges of discriminatory placement and failure to upgrade the affected class members as an "error in logic" and simply "unacceptable" in their letter to First American dated May 13, 1981.

In response to the OFCCP's allegations of discriminatory job placement, the Bank presented the following statistical evidence: over 93 percent of those listed as affected class members applied specifically for their position, did not specify a position, or had no application on file. The remaining 7 percent applied for positions other than the one into which they were placed. This closely corresponds with the percentage of non-affected class members within this job classification who were hired into positions other than the one for which they initially applied.

With respect to the upgrading issue, we have pointed out that since January, 1977, the Bank has had in effect a Job Posting System whereby job vacancies in the Bank are posted to afford employees an opportunity to bid on such open jobs. Since the institution of that system, all individuals in the alleged affected class who have posted for higher level positions have been promoted. Prior to the current Job Posting System, the Bank records indicate that seven employees in this position had requested and were subsequently granted higher level positions. The records indicate that no alleged affected class member who has seriously pursued advancement has failed to receive a promotion.

The availability and results of the posting process were communicated to the OFCCP during the submission of the original desk audit materials; however, to our amazement, the OFCCP continued to allege that this gorup of employees was "locked" into their positions and that the Bank had simply instituted a neutral practice of posting rather than taking affirmative action.

The OFCCP also alleged that the Bank had failed to take affirmative action with regard to training for these persons. The Bank's internal training and external tuition refund program were again found to be neutral by the OFCCP rather than positive affirmative programs. Although participation in training programs is voluntary, all employees are made aware of its availability during the orientation process. Employees are encouraged to participate in courses designed to enhance their career opportunities within the Bank. Additionally, the Bank sponsors an annual enrollment program to encourage all employees to join the American Institute of Banking and to participate in banking courses offered by the Institute. These educational opportunities are periodically communicated to all employees through employee bulletins and our company magazine. The Bank expended over $125,000 for these programs in 1980 alone.

It is our opinion that the OFCCP's position on the alleged "affected class," including both back and front pay remedies, is totally unsupported by the facts or as a matter of law. Totally aside from the legal question as to whether the OFCCP can or should seek and obtain monetary relief from a contractor under the Executive Order, their position that the mere presence of a number of individuals of a particular racial identity in a certain job category can be considered as proof of an absence of affirmative action is, on its face, logically unsound and legally indefensible.

After consideration of our repeated submission of statements explaining and defending our position, the OFCCP has acquiesced on only one point. They finally conceded that, by their own regulations, the maximum period of time any member of this alleged "affected class" would be due back pay was three years, rather than 13 years as they initially asserted. On all other points, they have rejected the Bank's refuting evidence without logical arguments to the contrary. This rejection has made any further negotiations futile.

We have finally concluded that, as a matter of principle, we will not give in to arbitrary and unreasonable demands of the OFCCP. It would certainly be less costly from a time and monetary standpoint to offer a sum of money and sign a conciliation agreement just to conclude this audit which has now been going on for over 16 months. If we believed the Bank to be wrong, we would not be here. We would have agreed to make anyone whole who had been wronged. However, this is not the case. We are proud of our record in promoting equal opportunity and affirmative action. We do not intend to let that record be tarnished through the conduct of the OFCCP which can only be described as bureaucratic blackmail.

The Bank has attempted to resolve the affected class issue by offering to institute an accelerated training and career counseling program and to alter the requirements for our tuition refund program just for the employees in this category. In fact, this program has already been implemented. However, the Bank's approach was rejected by the Nashville Office of the OFCCP, which has advised the Bank that the file will be sent to the Atlanta Regional Office with a recommendaton for enforcement proceedings unless the Bank agrees to the OFCCP's remedy of back and front pay for the affected class.

This is where we stand today, facing the possibility of debarment as a government contractor in spite of our sincere, and largely voluntary, efforts to implement a total program of affirmative action which goes far beyond either the spirit or the letter of the law Based on our experience, we join the United States Chamber of Commerce in its appeal to Secretary of Labor Donovan to participate in a thorough re-examination of affirmative action audits conducted by the OFCCP on a cost benefit basis.

I can personally testify to the fact that First American's human resources program development during the past twelve months has been less positive and progressive as a result of this compliance review. Furthermore several new programs which we had planned to implement during the year were delayed due to the allocation of resources required to deal with the OFCCP's audit. The Bank certainly would have preferred spending this time and money addressing positive internal and external programs.

We feel that the possibility of debarment of a federal contractor; which we construe to be "corporate capital punishment" for failing to comply with minor, bureaucratically-created technicalities without any evaluation of, nor credit for, its entire affirmative action effort; is totally unproductive and, more importantly, a severe detriment to the "spirit and intent" of promoting employment opportunities for minorities and females which underlie the Executive Order. We would like to see the Department of Labor utilize its resources from a more positive reinforcement standpoint by rewarding positive actions rather than following the process of negative enforcement and presupposed guilt, or, as in our case, of squandering its supposedly limited resources. We suggest perhaps the deferral of follow-up audits for a set period of time where a contractor has demonstrated good faith compliance with affirmative action goals.

Whether the Executive Order remains in its present form or is reissued in some new form as many organizations have suggested, we feel that compliance with its goals should be encouraged by a system of rewards for achievement rather than total emphasis on negative reprisals for failure to comply or on costly and time-consuming "audits" which are devoid of any reasonable evaluation of real progress in employment opportunity and little more than a total exercise in futility. More importantly, we feel that the emphasis should be on the same type of "bottom line" compliance adopted by the EEOC rather than on undue insistence on, or adherence to, meaningless technicalities and unfounded positions adopted and pursued only because "the manual says so."

We also feel that all charges of discrimination, whether class or individual in nature, should be processed by the EEOC under TITLE VII rather than the potential duplication of remedies for alleged employment bias that contractors currently face. We are strongly committed to the belief that the discrimination must be proven by the charging party by a preponderance of the evidence with the burden of proof squarely on those making such claims, rather than the position taken by OFCCP in our case where discrimination is presumed and all evidence to the contrary rejected or ignored. We broaden our recommendaton to include a general appeal to consolidate the OFCCP's and EEOC's jurisdictional authority to audit for compliance with federal non-discrimination regulations.

In summary, on behalf of First American Corporation, I would like to express our deep appreciation for this opportunity to communicate our frustrations and disappointments in dealing with the OFCCP. Instead of the professional, business-like approach that we had come to expect from agencies such as the Comptroller of the Currency and the Federal Reserve Board, we encountered illogical adherence to unsupported positions, redundant requests for information, obvious lack of understanding of materials actually provided, and a process which at best was unproductive and at worst, a total waste of both the agency's and our own resources.

Hopefully, as institutions like ourselves, represented here today, can stand together and offer alternatives to this audit process, affirmative action programs can become a more positive and constructive means of insuring the continued progress toward the advancement of all qualified individuals, but particularly minorities, females, veterans, and the handicapped.

Replies to Questions - Stephen C. Glenn, Bank of the West

1. WHY DO YOU THINK YOU WERE SELECTED FOR A COMPLIANCE REVIEW? I am not certain why Bank of the West was selected for a compliance review. I suspect it was because banking was a targeted industry, and at the time the review commenced Bank of the West was the largest bank headquartered in San Jose. The fact that we were only a block away from the OFCCP office in San Jose may have also entered into their decision to audit our bank.

2. COULD YOU DESCRIBE WHAT OTHER THREATS YOU RECEIVED FROM OFCCP? Two instances come to mind that I think could be categorized as threats by the OFCCP. The first was a statement made by the EOS in a meeting on April 30, 1981, where he said that if we signed a conciliation agreement, then we would avoid a further indepth review with additional interviews and possibly a validation study of job content and qualification by job title, to which he added that he wasn't certain that they, the OFCCP, could surface an issue, but it would certainly be expensive and time consuming.

Another instance that I think could be categorized as a threat occurred when the area office director made the statement in a meeting with the bank's President and our counsel that since we had not signed the conciliation agreement they would have to add "other deficiencies" to an amended show cause, and said that there were still additional areas that would have to be brought into the investigation. It was brought out by the bank at this meeting that the OFCCP was harassing us and threatening us with these "new issues". I think that just as important, however, was the overall tone that the review had taken from the outset of a very adversarial approach by the agency toward the bank with what appeared, at least from our perspective, to be a conscious effort to intimidate the bank into supplying data and agreeing to the agency's positions, regardless of what the facts of the issues being investigated indicated.

3. FROM YOUR EXPERIENCE, IS THIS HOW OFCCP TYPICALLY GOES ABOUT DISCHARGING ITS RESPONSIBILITIES UNDER THE EXECUTIVE ORDER? It's difficult for me to assess how the agency typically operates, however, from my discussions with other companies located in our area in meetings with the EEO coordinator's group, the Santa Clara County Manufacturers Group, California Bankers Association, AFFACT in Southern California, and some people I know at the American Bankers Association, unfortunately numerous other companies seem to have similar complaints and problems to those that we experienced at Bank of the West.

4. DID OFCCP EVER RECEIVE A CHARGE OF DISCRIMINATION FROM ONE OF YOUR EMPLOYEES? No, the OFCCP did not receive any discrimination charges against Bank of the West. There were no charges filed anywhere during the course of the review or the previous year, to the best of our knowledge.

5. HOW ARE ALL THESE THINGS SUPPOSED TO BRING MORE MINORITIES AND WOMEN INTO THE WORKFORCE? None of the requirements listed in the proposed conciliation agreement would have brought one additional protected class member into the work force or upward in the bank. Unfortunately, form rather than substance was the focus of the review and the agency's efforts in rectifying what they perceived to be deficiencies. In fact, focusing the attention on the paperwork really detracts from the real workings of affirmative action, such as community outreach programs, career counseling efforts, participation in special programs and training efforts.

6. DO YOU THINK THESE INCREDIBLY COMPLEX PAPERWORK REQUIREMENTS ARE AT ALL RELATED TO THE FUNDAMENTAL PURPOSES OF THE EXECUTIVE ORDER? No. My personal feeling is that the fundamental purpose of the Executive Order has been lost sight of by the agency, and that in their zeal to uncover discrimination on the part of contractors they've created a horrendously complex statistical approach which in essence only carries what in the final analysis are subjective estimates out to the third, fourth, fifth or sixth decimal place.

7. ARE YOU FAMILIAR WITH THE REGULATIONS THAT OFCCP [illegible] PROPOSE? IF THEY HAD BEEN IN EFFECT DURING THE TIME YOUR BANK WAS INVESTIGATED BY OFCCP, WOULD ALL OF THESE PROBLEMS HAVE BEEN PREVENTED? I've reviewed the proposed regs and it may have made some small differences in some areas such as not being able to count weekends and holidays in the time frames for our response to OFCCP requests for information. However, I feel that the fundamental problem of the adversarial approach that the agency has taken, and the intimidation tactics utilized by the agency, could have existed regardless of what the regulation stated, as this is a basic problem with attitude toward contractors that the agency takes with presumption of guilt that has to be uncovered and proved by the agency. This goes to a very fundamental problem with the way the agency's performance is measured. It's measured on the basis of show cause letters issued, conciliation agreements entered into and backpay awards developed by the agency, rather than looking at the real progress that is being made in affirmative action in terms of the statistical change in the representation of minorities or women in contractors' workforces. I feel that much more real progress will be made if the agency focuses on the positive rather than the punitive aspects of affirmative action, and works hand in hand with federal contractors to meet the objectives that all of us are looking for to assure that each individual has a truly equal employment opportunity, and to provide a vehicle for moving protected class members into meaningful and rewarding jobs.

First American

First American Corporation
Nashville, Tennessee 37237

Ann B. Ewers
Vice President

August 17, 1981

Mr. John Florez
Staff to the Chairman
Committee on Labor and
  Human Resources of the
  United States Senate
4220 Dirksen Building
Washington, D.C. 20510

Dear Mr. Florez:

I am enclosing our answers to questions asked by the Committee relative to our recent testimony at the recent hearings.

It was a pleasure being in Washington. We appreciate the opportunity given us to contribute to mounting evidence concerning problems with the policies and practices of the Office of Federal Contract Compliance. We trust that our testimony and that of the others affected by these practices will enable new appointees to this Agency to effect changes which will be beneficial to all concerned.

It was indeed a personal pleasure to meet you and to work with you on this project.

If, in any way, we at First American can be of further assistance to you or to the Committee, please don't hesitate to contact us.

Sincerely,

Ann B. Ewers

ABE/rab

Enclosures

2. IN YOUR STATEMENT, YOU COMPARE COMPLIANCE REVIEWS BY THE COMPTROLLER OF THE CURRENCY WITH THOSE CONDUCTED BY OFCCP. WHAT IS THE DIFFERENCE?

The examinations conducted by the Comptroller of the Currency have become events which our Board of Directors and management welcome as an evaluation of our progress in the Bank and within the industry. The constructive comments obtained from their professional examiners has allowed us to discuss problems and potential solutions. This has been of great help to us. We feel this is an excellent example of the role government can play in not only monitoring but also assisting industry. Neither this professionalism nor this approach was present in the OFCCP examination. Although we felt that our record supported the Bank's efforts in the area of affirmative action, there was clearly an adversarial role on the part of the OFCCP's staff from the onset of the audit. Their preconceived presumption of guilt was obvious. Without going into great detail, but as an example, the fact that their compliance officer, during the first few days of our on-site review, stated to one of our black bank officers - totally unsolicited, and a remark with which we totally disagree - that "it would be 500 years before a black was ever in senior management at First American" was completely unwarranted and indicative of the unprofessional and adversarial attitude surrounding our audit.

It is our belief that most, if not all, of the deficiencies asserted by the Agency were unreasonable and unfounded. Specifically on one allegation - that of an "affected class" - they have taken an unreasonable and untenable position by a blanket rejection of the Bank's compelling evidence. This rejection has made any further negotiations futile and, unlike the Comptroller's audit, constructive interactions hopeless.

(Editor's Note: Question #1, "Why were you selected as a company to be reviewed?," was asked of, and answered by Mr. Smithwick during his oral testimony. See page 115.)

3. YOU STATE THAT NO CHARGE OF DISCRIMINATION HAS EVER BEEN FILED AGAINST YOUR BANK, AND THAT YOU HAVE HAD CONSIDERABLE SUCCESS IN HIRING AND PROMOTING WOMEN AND MINORITIES. YET YOU WERE FORCED TO SPEND OVER $90,000, PRIMARILY MEETING OFCCP DEMANDS FOR PAPERWORK. YET OFCCP PLANS TO INITIATE DEBARMENT PROCEEDINGS AGAINST YOU. WHAT WILL YOU HAVE TO DO TO GET OFCCP TO CLOSE THE CASE AGAINST YOU?

As we stated in our written testimony, no complaint of a violation of Executive Order 11246 had ever been filed with the OFCCP and First American's record supported its progress in promoting and hiring women and minorities. During the audit process, the OFCCP requested vast quantities of records and data, requiring expenditures of over $90,000. Most of these inordinate expenditures of time and money could have been avoided had the Agency's representatives not made repetitive requests for the same data and imposed unreasonably short deadlines for compliance. In order to bring this review process to a conclusion, we would have to give in to arbitrary and unreasonable demands, including a monetary settlement for an alleged "affected class," which position we consider to be totally unsupported by the facts or as a matter of law.

We do not look forward to the possibility of debarment as a government contractor in view of our sincere, and largely voluntary, efforts to implement a total program of affirmative action which goes far beyond either the spirit or the letter of the law.

However, we have finally concluded that, as a matter of principle, we will not give in to the OFCCP's demands. It would certainly be less costly from a time and monetary standpoint to offer a sum of money and sign a conciliation agreement just to conclude this audit which has now been going on for over 16 months. If we believed the Bank to be wrong, we would have agreed to make anyone whole who had been wronged. This is not the case. We are proud of our record in promoting affirmative action. We do not intend to let our record be tarnished through the conduct of the Agency, which can only be described as bureaucratic blackmail.

4. IN DESCRIBING YOUR DIFFERENCES WITH OFCCP REGARDING YOUR AFFECTED CLASS ISSUE IT SOUNDS AS THOUGH IT'S A CLOSED ISSUE WITH THEM. IS THAT CORRECT? WHEN DO YOU THINK YOU'LL HAVE A FAIR CHANCE TO HAVE A THIRD PARTY ON THE ISSUE?

As we have stated previously, the OFCCP's blanket rejection of our arguments regarding the alleged "affected class" has made further negotiations futile. We had hoped that a previous conference held with the Regional Office would allow us a fair hearing but, to our dismay, they would not accept our two most logical and persuasive arguments. They simply instructed the Nashville Office to open negotiations on an individual-by-individual basis. We did not consider this to be a viable alternative in that their continued firm stance on not accepting the two primary arguments would not serve to decrease the affected class by any significant amount. We have submitted our arguments to the Washington Office for their review and are hopeful that the new appointees will review and accept our position and bring this audit to a conclusion. If this is not the case, we intend to utilize our appeal process through the federal court system where an allegation must be supported on a legal basis.

5. WHY DID YOUR BANK DECIDE TO COME FORWARD AND SPEAK OUT ON OFCCP'S REGULATIONS?

The current administration has committed to eliminate abuse and waste of government resources in order to improve not only governmental productivity, but also to stimulate the overall economy. When a government agency uses powers vested in it by Congress in a negative and unyielding way and, more importantly, in a way which is inconsistent with the original intent of its mandate, we feel compelled to bring examples of this waste and abuse to the government's attention.

ANSWERS TO QUESTIONS PRESENTED TO MR. HILL
PRESIDENT OF NATIONAL BANK OF GREENWOOD, INDIANA

1. You said that your Bank has been undergoing a compliance review for three years even though no one has ever filed a charge of discrimination against you. Why do you think OFCCP is subjecting you to this harassment?

Answer: It is true that the Bank has been undergoing a compliance review for approximately three years and that no employee or applicant has ever filed a charge of discrimination against the Bank. Although the Bank has no actual knowledge of why OFCCP selected it for a compliance review or has been harassing it, it does have some opinions on the point.

NBG is aware that OFCCP had selected banking as a "target" industry for its compliance reviews. The Bank feels that it was chosen for scrutiny because it is a relatively small employer of less than 140 individuals located in a predominantly white labor market (minority labor force 1.4%) 15 miles south of the City of Indianapolis. It believes OFCCP probably felt that it could "muscle" a smaller bank into submitting to its demands on form, statistical areas, work force analysis, utilization, analysis, etc. It would thus set an example that it could point to when subjecting other larger banks to compliance reviews. In short, we were the "guinea pig" in Central Indiana.

2. It seems each time you complied with an OFCCP demand for information, the agency said that more information was needed. What kinds of information was the agency seeking and why?

Answer: Throughout the compliance review the Bank has received numerous and voluminous informational requests. OFCCP has sent the Bank no fewer than six deficiency notices and seven informational requests. One would think that these informational requests would become gradually smaller as the information was submitted. However, the Bank's experience was exactly the opposite. Each time that it submitted information, the OFCCP would follow up with an expanded request seeking even greater and more detailed information.

The types of information requested included: employees name; dates of all jobs held; dates and amounts of all pay raises; the number of hours worked per week; copies of all job applications; employee evaluations; wage and salary recommendations; disciplinary records; attendance records; dates of termination; job descriptions; minimal qualifications for job; any changes in minimal qualifications over the years; race; sex; educational level; position hired into; date of hire; list of all persons transferred; list of all person promoted; minimum hours worked per week; for promotion and transfers, date of occurrence, name and title of person who made decision, basis for selection, other employees considered for the position and reasons rejected, job postings, other documentation to support decision; name of all employees who become pregnant, job title and pay rate of all employees who became pregnant, dates and amounts of pay increases for all employees who became pregnant, dates and names of job changes for all employees who became pregnant, date pregnancy became known to NBG, beginning and ending dates of pregnancy leave, whether formerly pregnant employees are still employed, address and telephone number of employees. The informational requests covered both past and present employees, as well as applicants. Some of the requested information went back to the year 1947.

As to why the OFCCP demanded all this detailed information, the Bank's only explanation is that the agency was on a "fishing expedition" trying to overturn every stone to see if it could find the Bank guilty of any type of discrimination. Significantly, after submitting all this information and going through the entire compliance review, the Bank is yet to be informed that any of its employees may have been discriminated against or that any of its policies or practices are discriminatory.

3. When OFCCP stated after reviewing the documents that you submitted that there were deficiencies, did these deficiencies pertain to discrimination against women and minorities?

Answer: As noted earlier the Bank received no fewer than six deficiency noties. However, invariably the deficiencies cited were of a technical nature, having to do with meeting the specific requirements of the regulations. The deficiencies did not pertain to any specific alleged discrimination against females or minorities, but primarily dealt with the format of the affirmative action program and how it was worded, how employees should be classified or what weights should be assigned in the 8-factor analysis formula. Examples of some of the deficiencies cited include the dates on the goals and timetables did not coincide with the date on the front of the AAP; the Bank failed to set a long-term goal for minorities and females in a job classification containing only one employee; goals were based on EEO-1 groups, not job groups; and the Bank's EEO policy statement was not dated.

4. What indications do you have that OFCCP is more interested in having you fill out paperwork than in carrying out the objectives of the Executive Order?

Answer: The agency is more concerned with form over substance. Indications of this are the totally inflexible demands by the agency that the Bank's AAP reflect almost to the exact word the requirements of the regulations. Additionally, most of the deficiency requests dealt with the form of the AAP, or the form of one of its components rather than the substance of the AAP. Most of the time was spent on redoing job groupings, eight-factor analysis for job groups, (This particular exercise was probably performed close to 10 or 12 times), and redrafting the AAP using words the OFCCP wanted.

Also, despite the fact that (1) the Bank has never had a discrimination charge filed against it; 2) in the past several years it has substantially increased its minority hirings; and 3) the OFCCP has complimented the Bank on its EEO posture, it appeared to continue to try and "dig up some dirt" on the Bank, rather than give it credit for any accomplishments made. It is interesting to note that NBG, a bank of only 138 employees, located in a labor market containing only 1.4 percent minorities, has within the past year or two hired approximately five minorities, none of whom applied because of affirmation action efforts mandated by OFCCP.

5. Has OFCCP ever worked with you to help overcome any discriminatory barriers that might be present in your community or your workforce or is its focus purely on filling out paperwork?

Answer: The OFCCP has not assisted the Bank in attempting to overcome any discriminatory barriers that they feel might be present in the community or the work force. Its focus has almost been entirely on form of the AAP, filling out charts and graphs, and supplying information on employees. In a very real sense, the OFCCP's real interest seems to be in setting up and taking over the Bank's personnel function with the Bank's Vice-President of Personnel Mr. Hurrell reporting to OFCCP.

It also appeared to be OFCCP's goal to create artificial barriers to the Bank's ever achieving its goals and timetables. Although the Bank's labor market contained only 1.4% minorities, OFCCP wanted NBG to set goals based on the minority population of Indianapolis and 5 counties north of Greenwood, Indiana, none of which are viable labor areas for a community bank in Greenwood, Indiana. The difference in the labor areas used is significant. The area OFCCP wanted contained 12% minorities. To force the Bank to use that labor area would mean that NBG would probably never meet any goal or timetable it set and would always be found deficient whenever OFCCP audited the Bank.

6. Am I correct in saying that you have spent $100,000 and 4,000 hours of time in complying with incredibly burdensome paperwork demands stretching over the past three years, that no charge of discrimination has ever been filed against your Bank, that OFCCP investigators have complimented you for your affirmative action efforts, but that OFCCP refuses to bring this matter to a close?

Answer: To-date, the compliance review been has very expensive to NBG in both time and money. Since the beginning of the review NBG Vice-President, Wilson Hurrell, has maintained a record of hours spent on Bank employees in working on the AAP/OFCCP review. Between March and December of 1979 Bank personnel spent approximately 1,815 hours; in 1980, 1,671 hours were spent and, during the first six months of 1981, 304 hours had been spent. This totals approximately 3800 hours in two and a half years, which translates to approximately $87,000.00 in salaries and fringe benefits. Not included in this calculation would be time spent by labor counsel and the attendant legal fees, plus photocopying expenses, supply costs and other miscellaneous expenses, which easily puts the Bank over the $100,000 mark.

The Bank is shocked that it has had to spend this type of money for a routine compliance review, particularly when it has never had a charge of discrimination filed against it, has never been informed that any of its policies or practices are discriminatory, has never been informed that the OFCCP has found any employee has been treated discriminatorily, and, in fact, the OFCCP investigators have complimented the Bank on its affirmative action efforts. Despite all these things, and despite the fact that since September of 1979 the Bank has been adamantly demanding that its program be approved, the OFCCP has yet to bring this matter to a close.

7. Mr. Hill, as a business man and with your current experience with OFCCP, what kind of attitude do you have now about affirmative action?

Answer: The answer to this question is contained in Mr. Hill's remarks to the Sub-committee.

Mr. FLOREZ. I want to announce the people who will participate tomorrow. They will be: Dr. Arthur Hansen, president of Purdue University; Carol Grossman from the Women's Equity Action League; Estelle Fishbein, general counsel of Johns Hopkins University; Frank Hammond with the Dow Chemical Co.; Althea Simmons with NAACP, James Nixon, vice president of I.T. & T.; and Juan Trujillo from Petro-Lewis.

Again, I want to thank all of you.

[Whereupon, at 12:10 p.m., the hearing was recessed, to reconvene at 9 a.m. the following day.

OVERSIGHT OF THE ACTIVITIES OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE DEPARTMENT OF LABOR

THURSDAY, JULY 30, 1981

U.S. Senate,
Committee on Labor and Human Resources,
Washington, D.C.

The committee met, pursuant to recess, at 9 a.m., in room 4232, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the committee) presiding.

Present: Senators Hatch and Quayle.

Staff present: John Florez and Diane Holland, professional staff members.

The Chairman. The committee will come to order.

As I indicated yesterday, the purpose of this set of hearings is to examine the effects of the current regulations upon Federal contractors, women, and minorities. While I have been inundated with complaints in the past about the OFCCP's regulations and of its preoccupation with procedures, I was shocked to hear at yesterday's hearings of the ruthless blackmail—one called them extortion tactics—used by the OFCCP compliance officers upon Federal contractors. One businesswoman told us: "I felt harassed and assaulted." While the chairman of Prudential can afford to spend $1.5 million in compliance reviews, small businesses sometimes simply have to go out of business.

While everyone yesterday was supportive of the initial intent of Executive Order 11246, all felt the OFCCP had lost sight of its intended reasons for existence. As was pointed out yesterday: "There has to be a better way," other than the present situation where contractors are seen as the enemy, where conflict is the norm rather than the exception.

We also heard of the thousands upon thousands of dollars Federal contractors are forced to spend on reports the OFCCP demands which measure process and not results.

After yesterday's witnesses, I am convinced this committee should act to stop the harassment now being carried on by compliance officers against employers. I am convinced that harassment is a poor tool for ending discrimination in the Federal contract workplace. We can do better. America's people deserve better. Today we will hear that the OFCCP has not yet figured that out.

We have several Americans here this morning to testify as to their experiences when they tried to comply with the wishes, whims, and caprices of the agency that should be policing discrimination by Federal contractors. We will also hear from several Americans representing the groups for whom affirmative action was designed to benefit.

We will begin our hearings this morning by calling Dr. Arthur G. Hansen, the president of Purdue University of Lafayette, Ind., to be our first witness.

Dr. Hansen, if you would kindly come forward, we would be happy to listen to your testimony.

STATEMENT OF DR. ARTHUR G. HANSEN, PRESIDENT, PURDUE UNIVERSITY, LAFAYETTE, IND.

Dr. HANSEN. Thank you, Mr. Chairman.

I might begin by saying I have a statement for the record. It is a bit long. I thought I would speak from it.

The CHAIRMAN. We will put all statements in the record as though fully given. They will appear following the oral presentations. We do appreciate summaries. That allows us more time to ask questions.

Dr. HANSEN. Let me begin by talking for a moment about Purdue University. It is a large university. It is Indiana's land-grant university founded in 1869. It is academically organized around nine schools—they would normally be colleges in most universities—that are largely professional in nature.

We have approximately 50,000 students on 4 campuses and 10,000 faculty and staff. We graduate the largest number of bachelors of science and engineering per year of any university and teach more courses in science to our students than any other university in North America. I say all of these things mainly to point out that we are very large and very complex. I want to come back to that point in a moment or two.

I think as president of such a large university, I am concerned about a variety of Federal regulations relating to areas from basic research grants to student aid and to personnel. It is on personnel issues that I would like to concentrate this morning, and on the regulations affecting what we would call our personnel policies. By that, I mean everything from hiring and retention to termination of our faculty and staff. In particular, I would like to concentrate on how affirmative action and OFCCP have impinged upon these practices in personnel.

I would like to make it rather clear at the outset that we do support affirmative action and also what we would describe as "term accountability" by OFCCP. I have been a university president for over a decade and I have seen some of the good things that can happen. I would venture to say that many of the aspects of affirmative action have been helpful. I would not deny that. However, our problem has been in the practice of how affirmative action has been carried out under the auspices of OCR and OFCCP.

Let me turn quickly to a remark I have in my written statement concerning some recently published documents. Although I am here as an individual college president, I think I speak for many of my colleagues on this area of affirmative action and also for some of our educational institutions. I have included in my statement a quote from the National Association of State Universities and

Land-Grant Colleges and the American Association of State Colleges and Universities on Federal regulations. I want to make this one point.

My quote is this:

> Accountability often becomes a code word for Government red tape. It appears that regulation has a life of its own and threatens to become an end in itself. A proliferation of requirements dealing with accounting is poisoning university-Federal relations and often tends to paralyze creativity.

What I think is referred to here as mainly financial accountability applies even more so to the type of accounting required by Federal agencies in the enforcing of Executive Order 11246. In our frenzy to cover in minute detail all aspects of the employment process, we seem to have lost the true goal of affirmative action in reams of red tape. I wonder if we may be looking at human beings not as real people but rather as pawns in a strange game of data manipulation.

I have also included as appendices a statement from the American Council on Education. It is a rather detailed set of recommendations. Also, I have included a report of our affirmative officer at Purdue and some suggestions he has made about the problems that we have. Finally, I have included a document from my executive assistant, Dr. John Hicks. In a similar hearing back in 1975, he pointed out existing problems. As I read that the other day, I was astonished to see in the 6 years that have intervened, almost nothing has changed. History is again repeating itself.

My intent here this morning is not to be ultra critical, but rather to point out problems, and, with that, to hopefully suggest some means of improving processes to make them productive and effective.

Let me begin my critique of some of the things that have taken place by coming back to a point I made earlier. I would reiterate that we are a large, complex university organized around nine academically autonomous schools.

One of our problems is that OFCCP procedures for monitoring our university assume and impose a highly centralized industrial management model. This approach simply does not provide an appropriate analysis of the collegiate environment. This lack of sensitivity of knowing who we are and what we are like, creates serious conflicts.

We are different from companies, from banks, and from manufacturers. Yet when we have had reviewers come to review us they have referred to us in many cases as "the company." Even in the case of correspondence we are referred to as "the plant." The implication is that we are no different, for instance, than a corporation.

This has led to such things as assuming that we hire centrally, that there is somebody "up there" that does all the hiring for us in a central administrative office. There is a feeling oftentimes that we promote by seniority, which is not true at any university that I am aware of.

This insensitivity to what we are like and how we are structured has led to frustration on both parties' parts. The reviewers do not understand what we are like and our people at the university do not understand what the reviewers want.

When all of this is boiled down, we end up with data being collected that I can only term nonrelevant. It does not have the significance for a university that it has, perhaps, in some other institutional configurations.

Right along with that, speaking of the frustration we feel—and that I think reviewers feel in turn—let me turn to a point that you made earlier, Mr. Senator. That point is a perception of an adversary relationship. One comes into these reviews almost sensing that there is a mandate to find something wrong. Now, if I recall the original formulation of our Executive orders, there are references to technical aid being offered. I do not think we have ever had such aid.

In one instance not long back, we prepared some material that was not in the precise format that the reviewers had asked for. Instead of asking what we were doing and how our approach differed from that which was expected, the immediate conclusion was reached that we were trying to cover something up—that we were hiding something because those data were not in the precise form asked for. This is one thing that we just deplore and resent.

How do we deal with this? Basically we do as we are told and we go through the required data collection process. However, as I have talked to my colleagues, I think there is a real feeling that the spirit of the law has been lost, that we are indeed playing a sophisticated game. I think to some extent both parties recognize that, and therefore the intent and the spirit of the law have vanished.

Right along with that is a matter that I am sure you have been told about so often—the expense of data collection. It is costly and time consuming. I see a pile of documents here from one company. I am not certain that I could match it, but recently we were asked to supply information to the OFCCP and we came out with a 600-page document and 3,000 pages of data printout. Who is going to read that? Who is going to digest such data and comprehend what that information means?

That leads to another point here. As this data flows out, and as it is given to our reviewers, what happens to it? This leads to another problem. It seems these reviews are never closed. They go on and on and on.

I have listed in my statement here a chronology of what happened at Purdue University. It goes all the way back to June 1970, 11 years ago, when we had our first affirmative action program reviewed. In that year in June, the request came, and, in July, we received a request for a large quantity of information to be given to the OCR. In 12 days, under pressure, we had that information ready.

The next time that we heard from them was 3 years later. Nothing had happened in the meantime. One might say that that was back in the old days and things have changed since then or procedures have been improved. I would submit that that is simply not true.

In fact, as recently as December 1978, we had a preaward review initiated by OFCCP. Again, information was supplied. But, we did not get the matter settled until March of 1981. We were hanging in limbo all that time, not knowing whether we were in compliance or not. All of this holding off, of never knowing where you are, this being in limbo is extremely frustrating. The idea of not closing a review haunts us continually.

Once again, why do we put up with this? Why do we go along with what we oftentimes feel is an unreasonable demand? I think the reason is clear. Hanging over our heads is that constant threat, that big club: either you comply or your Federal support will be withdrawn.

A university of our size simply cannot afford a cutoff even for a short time. Referring to the review I mentioned a moment ago, there was a period of about 3 months when we did not know whether or not our Federal support would be withdrawn.

The CHAIRMAN. That must have been a pretty tremulous period for you.

Dr. HANSEN. It was unbelievable. We thought of all kinds of contingency plans of what we might do. My chief financial officer said there was no simple way. Even if a part of our program was withdrawn, it would be disastrous. With that in mind, you simply comply. In short, you cannot take the chance. That, I think, is something we resent and resent very, very much.

For a final statement, let me turn to the positive side of what we can do. First of all, leading from these remarks, I propose that we do not attempt to do the whole affirmative action job at one time for all institutions. I have talked about Purdue and the data that we supplied and the compliance reviews we have had. We are only one school. Why can we not go at this in much the same way the Internal Revenue Service makes its audits—perhaps by random selection, or, if there is a triggering mechanism, single out a school, do a good review job, have people do the review who understand what a university is like, and finally close it. To attempt to do the whole job for all institutions at one time is physically impossible.

Next, please train personnel to be sensitive to the unique characteristics of various institutional groups. My gosh, come and ask us for help. We would be very pleased to sit down with people and tell them what a university is like, how it is structured, how it functions, what the hiring practices are like, what tenure is, what promotion policies we have. In short, we are willing to be on the team, but we have not been asked.

Drop the adversary posture. I do not know from whence this stems. Perhaps it is a feeling that there has been so much wrong done in the past that somehow punishment must finally be taken.

The CHAIRMAN. For your information, it is not limited just to the OFCCP. There are complaints about almost every agency in Government. The form continually becomes more important than the substance. There is a constant justification of their jobs through increased paperwork and increased subjection of the private sector, or in this case the university sector, to their whimsies. I think you feel a little bit that way yourself.

Dr. HANSEN. Absolutely. I said earlier that I supported the ideas of affirmative action for very good reasons. We have minorities and women students who I think need role models. We need to get the very best people we can get on our faculty. We are in the same game. We are not adversaries. When we are confronted with that attitude, it causes us no end of concern.

Finally, come up with sensible data gathering systems. Here again, campus affirmative action officers would be more than willing to work with the OFCCP on this problem. Specify reasonable times for data gathering. We have had people working nights and weekends to meet a deadline. After we have done this, then, as I said earlier, nothing happens. These current pressures on the university to meet short-term deadlines are absolutely unbelievable. The end product again is resentment, resentment against the Federal Government, which I would submit, once again, is senseless.

What we ask for is simple in principle. Before regulations and guidelines are drafted and imposed upon universities and colleges, consult us, talk to us. Let us first reason together and then proceed. The irony is that the objectives of the Federal Government and the university community, are basically the same. Both are committed to affirmative action and equal opportunity in the development and use of human resources. It is no more complex than that.

Mr. Chairman, I appreciate this opportunity to make these points known to you and your committee. Again in this spirit, I would hope they are helpful. We think the way things are going right now we are headed in the wrong direction. The credibility of OFCCP and a fine program is very apt to go down the drain.

I would be pleased to answer any questions, sir, that you might wish to ask.

The CHAIRMAN. Thank you so much.

I find it unbelievable that the OFCCP would subject you to 8 years of review, then hammer out an 11th-hour agreement in November of 1972, and then 6 months later tell you they will not abide by the agreement. Then they do not give you an alternative.

Dr. HANSEN. Yes, sir.

The CHAIRMAN. These are allegations you are making here that you feel you can prove?

Dr. HANSEN. That is correct.

The CHAIRMAN. Yesterday we heard how OFCCP violated its own agreement with Prudential and had to be taken to court to abide by it. At the time, did you feel you had any recourse?

Dr. HANSEN. No, we did not. In our particular case, we felt the only recourse we had was to get the job done.

The CHAIRMAN. Yet they would not get it done with you?

Dr. HANSEN. No.

The CHAIRMAN. They just dragged it out, dragged it out, and dragged it out for 8 years?

Dr. HANSEN. Yes.

The CHAIRMAN. Did you ever feel that you had a satisfactory resolution of the problem?

Dr. HANSEN. At the present time, as far as I know, there are no other claims against us. Our plan has apparently been accepted. However, we are still wondering if there is a final closure. I think I would pick up that particular point to emphasize again. We wish somebody would say:

> You are all right. Your program is a good program. We are now going to step back and let you alone for awhile. We are not going to be back on the campus again in a few weeks.

Continual uncertainty is the one thing that bothers me the most. As my statement points out, all that was finally said in our final case was that our "show cause" order was now pulled back. Let me see if I can find those exact words.

The **Chairman**. While you are looking for that, I do not know whether you know this or not, but in the OFCCP compliance manual, it plain does not allow for them to tell you that your problems are resolved.

Dr. **Hansen**. Sir?

The **Chairman**. In the compliance manual of the OFCCP, I do not believe it even calls for telling you that your problems have been resolved.

Dr. **Hansen**. It does not. That is my understanding, too.

The **Chairman**. That is a pretty pathetic situation.

You are saying all during this time they are holding the club over your head that unless you meet every need that they seem to impose upon you, you might lose Federal funding, which of course would bankrupt your university or at least put it out of business.

Dr. **Hansen**. As chief executive officer of the university, I cannot risk that.

The **Chairman**. Therefore, it means you either comply or else, whether you agree or do not agree. Is that right?

Dr. **Hansen**. Yes. When deadlines are set, I have simply told our people you find the time, you find the way to meet the deadline, period. Otherwise the risk is too great.

As I point out in my statement, in March we were notified that a show cause order was withdrawn and a compliance review was canceled. That was it.

The **Chairman**. That was all they gave you?

Dr. **Hansen**. That is right.

The **Chairman**. Did they ever come and say: "We are proud of what you have done and we think that things are fine now and your problems are over. We hope we never have to come back again," or anything like that?

Dr. **Hansen**. We would like to have that happen one time.

The **Chairman**. You are saying it was that tense?

Dr. **Hansen**. Yes.

The **Chairman**. About how much do these procedures by the OFCCP cost Purdue University?

Dr. **Hansen**. I have asked for that figure but right now I simply cannot say.

The **Chairman**. Give us an estimation if you can.

Dr. **Hansen**. I would say it is tens of thousands of dollars per year. That, I think, is a very conservative estimate.

The **Chairman**. You are saying maybe hundreds of thousands of dollars just to meet these requirements?

Dr. **Hansen**. Oh, yes.

The **Chairman**. We had banks in here yesterday, small banks at that. At least two of them said it cost them well over $100,000 for basic review. Those are small banks. Purdue University is one of the great universities in the world. I am sure it is a very, very important and expensive business to run.

Dr. **Hansen**. I would think that the cost of turning out those 3,000 pages of data is probably in the hundreds of thousands of dollars. It would have to be.

The **Chairman**. How did it affect you as president of the university? Did it take a lot of your time?

Dr. **Hansen**. I would honestly say no, only insofar as I have had meetings with my staff to monitor reviews, but most of it is done by my staff who are compiling data and who are meeting with the reviewers. It has not taken that much of my time directly, which I am thankful for.

The **Chairman**. How many staff people do you have working on these problems?

Dr. **Hansen**. We have people in every department or every school at the university. We have an affirmative action office. We have a number of people in the data collection area simply compiling it and putting it on the machines and working on the software. Again, I would be glad to furnish that figure, but I cannot give you one. It is a large number.

The **Chairman**. Do you feel that Purdue has any difficulties in complying with nondiscriminatory practices? In other words, do you think Purdue has a good record in nondiscrimination?

Dr. **Hansen**. I am choosing your word "nondiscrimination."

The **Chairman**. You might want to put it the other way. Does Purdue discriminate, or has it had a reputation for discrimination against minorities, women, and handicapped?

Dr. **Hansen**. Not to my knowledge. I say that insofar as there are legal actions to which people have recourse. They can file complaints—and they have—against us in the past years. We have never lost a case yet. At least from that standpoint, anyone who has even felt that they have been discriminated against has not proved the case.

That is not the problem. I think I could speak very honestly and say that to my knowledge at least, I do not know of cases where we discriminate. That is a little different than "affirmative action." Here we have worked hard in ways quite different from the OFCCP.

The **Chairman**. In other words, voluntarily you have tried to take what one witness characterized as positive action approaches toward the hiring of minorities and women?

Dr. **Hansen**. That is right. We had an employment search recently in one of our departments. This was a department in which I think you would expect there would be a fairly good size pool of women and minorities. Our provost did not see evidence of an extended search for women and minorities. He went back to that school and said, "I will not accept your candidate list. I will not accept the people you have picked here for candidates because you are in an area where women and minorities should be available and there are none on the list. Go back and try it again." An additional point was made. He thought that the recruiting was being done ineffectively, that it could best be done by contacts on other campuses, by finding out who the new Ph. D. graduates were, and seeking them out.

This fall we plan to hold what I would call a "recruitment seminar" for our department heads on how to go about getting women and minorities. It is not as simple as sitting in your office and putting an ad in a newspaper like the "Chronicle of Higher Education." That is not the way the job is done. There are ways. You can recruit people. We are going to help our department heads in areas that we think the chances of getting people are very good. That has nothing to do with anything we have encountered with data collection or OFCCP. We wish to do it. I think that comes back to my basic point that we are on the same team.

The **Chairman**. Did the compliance officers ever attempt to try to understand your administrative structure and adjust their review to your management reports and systems?

Dr. **Hansen**. I really cannot answer that. I think that we have tried to explain. A university is complicated. I think even people who have been at the university a while themselves do not truly understand all of the internal structure—the fine distinctions between tenured people, people on a promotion track and a ladder track, and professional personnel versus faculty. These ideas take time to learn. For somebody to come in cold and in a short period of time comprehend that is very difficult. But we have tried.

The **Chairman**. Unless, as you suggested, they understand university structures and have some expertise in that area and are really coming in with knowledge rather than from scratch.

Dr. **Hansen**. This is right. I would again say this can be done. We will be very happy to help.

The **Chairman**. As a university, you are subject to EEO requirements found in title VI and title VII of the Civil Rights Act, title IX of the Education Act amendments, and Executive Order No. 11246. Are you troubled by this?

Dr. **Hansen**. Oh, yes, we have had our problems. To take the case of title IX, we think we are in good shape. But I do not really know. We have not had a review yet. I know other universities have had reviews with some rather unfortunate results. We have worked hard, I think, to meet the spirit of the law. We are simply waiting for something to happen. I am sure that it shall.

It goes far beyond this one area. There are a number of areas. Title 9 has been on our minds for a long time. Even within our own ranks, we have tried to decide what we are expected to do. How do we know that we have treated male and female athletes comparably? We are doing the best we possibly can.

The **Chairman**. If you would like to provide for the record some illustrations or examples of these problems because of overlapping jurisdiction, we would like you to do so. That would be helpful to this committee. I think you would be doing the country a service as well because we are trying to get to the bottom of what is the best way of solving discrimination and affirmative action problems in our society without oppressing the American people to death. Of course, we have a wide disparity of belief with regard to how you go about doing this or solving these problems.

Dr. **Hansen**. We have not had serious problems in the area of overlapping jurisdictions per se.

The **Chairman**. Dr. Hansen, we are very appreciative that you could take time from your busy schedule to be here. We think it is important that you testify. I suspect that you are representative of many other universities in this country that have similar difficulties. We think you have done a great service in being willing to testify here today.

Dr. **Hansen**. Thank you, Senator. As you have already indicated, the hope that we have is to get the job done and done effectively.

[The prepared statement of Dr. Hansen and additional material supplied for the record follows:]

REMARKS OF ARTHUR G. HANSEN
BEFORE THE SENATE COMMITTEE
ON LABOR AND HUMAN RESOURCES
JULY 30, 1981

MR. CHAIRMAN:

MY NAME IS ARTHUR G. HANSEN AND I AM PRESIDENT OF PURDUE UNIVERSITY. PURDUE, WHICH IS THE LAND-GRANT UNIVERSITY FOR INDIANA, WAS FOUNDED IN 1869 AND IS ACADEMICALLY ORGANIZED AROUND THE SCHOOLS OF: AGRICULTURE; ENGINEERING; CONSUMER AND FAMILY SCIENCES; HUMANITIES, SOCIAL SCIENCE, AND EDUCATION; MANAGEMENT; PHARMACY AND PHARMACAL SCIENCES; SCIENCE; TECHNOLOGY; VETERINARY MEDICINE; AND THE GRADUATE SCHOOL. PURDUE ENROLLS MORE STUDENTS IN SCIENCE COURSES THAN ANY OTHER AMERICAN UNIVERSITY; RANKS FIRST IN THE NATION IN THE NUMBER OF BACHELOR OF SCIENCE DEGREES IN ENGINEERING; AWARDS MORE DOCTORATES IN PHARMACY THAN ANY OTHER UNIVERSITY AND RANKS FIFTH IN ENGINEERING, THIRD IN CHEMISTRY AND THIRD IN PSYCHOLOGY IN GRANTING PH.D. DEGREES. SPONSORED PROGRAMS IN RESEARCH EXCEED 45 MILLION DOLLARS ANNUALLY. OUR TOTAL UNIVERSITY ENROLLMENT IS OVER 50,000 STUDENTS ON 4 CAMPUSES AND WE EMPLOY 10,000 FACULTY AND STAFF.

MY CONCERNS WITH FEDERAL REGULATIONS COVER A MULTITUDE OF AREAS. WE ARE

CURRENTLY EVALUATING HOW THESE REGULATIONS IMPACT SUCH WIDE RANGING ISSUES AS STUDENT AID, BASIC RESEARCH, ACCESS TO STUDENT RECORDS, THE CONFIDENTIALITY OF FACULTY DELIBERATION AND PERSONNEL POLICIES.

TODAY I WANT TO RESTRICT MY ATTENTION TO THE AREA OF PERSONNEL POLICIES AND HOW THE REGULATORY PROCESS INTERACTS WITH THOSE POLICIES. BY PERSONNEL POLICIES, I MEAN THE RECRUITMENT, SELECTION, PROMOTION, COMPENSATION, DISCIPLINE, AND TERMINATION OF FACULTY AND STAFF. SPECIFICALLY I WANT TO DESCRIBE PURDUE UNIVERSITY'S EXPERIENCE WITH THE OFCCP AS WE HAVE DEALT WITH THIS AGENCY IN THE BROAD AREA OF AFFIRMATIVE ACTION.

FIRST, HOWEVER I WANT TO EXPRESS MY UNEQUIVOCAL SUPPORT FOR AFFIRMATIVE ACTION, ITS GOALS AND PURPOSES. AS AN EDUCATOR AND ADMINISTRATOR, I HAVE LIVED THIS PHILOSOPHY FOR MANY YEARS. I SUPPORT OFCCP AND THE CONCEPT OF ACCOUNTABILITY. I RECOGNIZE THAT MUCH OF THE PROGRESS IN PROVIDING EQUAL EMPLOYMENT OPPORTUNITY MIGHT WELL NEVER HAVE COME, OR AT LEAST, WOULD HAVE BEEN MUCH SLOWER IN COMING, HAD THERE NOT BEEN VIGOROUS ACTION BY OFCCP AND OTHER COMPLIANCE AGENCIES.

BEFORE TURNING TO SPECIFICS, I WOULD POINT OUT THAT, THOUGH I SPEAK AS PRESIDENT OF A PARTICULAR UNIVERSITY, MY CONCERNS ARE ALSO SHARED BY OTHERS. AS AN EXAMPLE, IN A RECENT STATEMENT PREPARED BY THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES AND THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, THE ISSUE OF FEDERAL REGULATIONS IS ADDRESSED. WHILE UNDERSCORING THE GENERAL NEED FOR COLLEGES AND UNIVERSITIES TO BE ACCOUNTABLE FOR THE MONIES THEY RECEIVE THEY STATE:

> "... ACCOUNTABILITY OFTEN BECOMES A CODE WORD FOR GOVERNMENT RED TAPE. IT APPEARS THAT REGULATION HAS A LIFE OF ITS OWN AND THREATENS TO BECOME AN END IN ITSELF... A PROLIFERATION OF REQUIREMENTS DEALING WITH ACCOUNTING IS POISONING UNIVERSITY-FEDERAL RELATIONS AND OFTEN TENDS TO PARALYZE CREATIVITY."

WHAT IS SPOKEN OF HERE AS PRIMARILY FINANCIAL "ACCOUNTING" APPLIES EVEN MORE TO THE TYPE OF "ACCOUNTING" REQUIRED BY FEDERAL AGENCIES IN THE ENFORCING EXECUTIVE ORDER 11246.

IN OUR FRENZY TO COVER IN MINUTE DETAIL ALL ASPECTS OF THE EMPLOYMENT PROCESS, WE SEEM TO HAVE LOST THE TRUE GOAL OF AFFIRMATIVE ACTION IN REAMS OF RED TAPE. I WONDER IF WE MAY BE LOOKING AT HUMAN BEINGS NOT AS REAL PEOPLE, BUT RATHER AS PAWNS IN A STRANGE GAME OF DATA MANIPULATION.

I WOULD LIKE TO QUICKLY REFER TO TWO DOCUMENTS WHICH I HAVE APPENDED TO THIS REPORT. THE FIRST IS A LIST OF SPECIFIC PROBLEM AREAS DRAWN UP BY PURDUE'S AFFIRMATIVE ACTION OFFICER, MR. PAUL BAYLESS. IN ADDITION, I COMMEND TO YOUR ATTENTION THE DOCUMENT SENT FROM DR. JACK W. PELTASON, PRESIDENT, AMERICAN COUNCIL ON EDUCATION, TO THE COMMITTEE ENTITLED "REGULATORY REFORM AGENDA." THE THIRD IS A STATEMENT AT A HEARING SIMILAR TO THIS ONE GIVEN BY MY EXECUTIVE ASSISTANT, DR. JOHN HICKS, IN 1975. SADLY, THE POINTS MADE BY DR. HICKS ARE AS VALID TODAY AS THEY WERE SIX YEARS AGO.

WHEN I EXPRESS CONCERNS ABOUT CERTAIN ASPECTS OF REGULATORY PROCESS, IT MUST BE CLEAR THAT MY OBJECTIVE IS TO IMPROVE THE ADMINISTRATION OF ACCOUNTABILITY, AND TO CHANNEL LIMITED RESOURCES INTO THE MOST PRODUCTIVE AND EFFECTIVE ACTIVITIES.

UNFORTUNATELY, MUCH OF OUR EXPERIENCE AT PURDUE TO DATE HAS DEMONSTATED THAT OFCCP'S PROCEDURAL APPROACH TO AFFIRMATIVE ACTION ACCOUNTABILITY HAS BEEN COUNTERPRODUCTIVE. AS I STATED EARLIER, WE ARE ORGANIZED AS A UNIVERSITY AROUND TEN ACADEMICALLY AUTONOMOUS SCHOOLS. HOWEVER, OFCCP PROCEDURES FOR MONITORING OUR UNIVERSITY ASSUME AND IMPOSE A HIGHLY CENTRALIZED INDUSTRIAL MANAGEMENT MODEL. THIS APPROACH SIMPLY DOES NOT PROVIDE AN APPROPRIATE ANALYSIS OF THE COLLEGIATE ENVIRONMENT. THIS LACK OF SENSITIVITY IN DEALING WITH UNIVERSITIES CREATES SERIOUS CONFLICT.

WHILE WE CANNOT BE SET APART, WE ARE DIFFERENT IN STRUCTURE AND IN POLICY MATTERS FROM RETAIL STORES, MANUFACTURERS, AND BANKS, FOR EXAMPLE. YET OFCCP SEEMS TO MAKE LITTLE DISTINCTION. IN CORRESPONDENCE, PURDUE HAS OFTEN BEEN REFERRED TO BY OFCCP REVIEWERS AS "THE COMPANY" OR "THE PLANT." WE GET REPORTS THAT FIELD WORKERS OFTEN DO NOT KNOW THE DIFFERENCE BETWEEN ACADEMIC AND NONACADEMIC APPOINTMENTS, OR DO NOT GRASP THE DISTINCTION BETWEEN TENURE AND PROMOTION. BUSINESS PRACTICES SUCH AS CENTRAL HIRING AND SENIORITY PROVISIONS ARE OFTEN ASSUMED TO EXIST AT UNIVERSITIES, EVEN THOUGH I KNOW OF NO UNIVERSITY

WHICH EXECUTES SUCH PERSONNEL DECISIONS CENTRALLY. MOREOVER, DATA COLLECTION FORMATS SPECIFIED BY OFCCP ARE BASED ON BUSINESS MODELS THAT ARE INAPPROPRIATE IN A UNIVERSITY SETTING. THE END RESULT IS A DATA FILE THAT LACKS TRUE RELEVANCE.

THE SECOND POINT I WISH TO EMPHASIZE IS THE EQUALLY DISTURBING PERCEPTION OF A GROWING ADVERSARY RELATIONSHIP BETWEEN OFCCP AND THE UNIVERSITY ADMINISTRATION. WE FEEL A DEEP SENSE OF FRUSTRATION AND MISTRUST WHICH UNDERMINES THE PRODUCTIVITY OF OUR COMMON EFFORT. ALTHOUGH COMPLIANCE REVIEW MANUALS STATE THAT OFCCP IS TO FURNISH TECHNICAL ASSISTANCE, VERY LITTLE MEANINGFUL HELP HAS BEEN PROVIDED. ON THE CONTRARY, WHEN DATA FURNISHED WERE NOT EXACTLY IN THE PROPER FORMAT, WE WERE SUSPECTED OF TRYING TO COVER UP PROBLEMS.

HOW DO WE DEAL WITH THIS? WE YIELD TO THE PRESSURE, AND DO WHAT IS REQUIRED, VERY OFTEN EXPENDING EFFORTS AND RESOURCES REDESIGNING COMPUTER PROGRAMS TO SATISFY WHAT WE HAVE COME TO VIEW AS WHIMSICAL DEMANDS. IN THIS DEFENSIVE POSTURE, WE COVER ONLY ITEMS ASKED FOR, AND END UP LOSING SIGHT OF

THE SPIRIT OF THE LAW BUT FOLLOWING THE LETTER OF THE REGULATIONS (AS LEAST AS PERCEIVED BY REVIEWERS!)

SUPPORTING THIS PERCEPTION OF AN ADVERSARY RELATIONSHIP ARE THE DEMANDS FOR DATA THAT COST THOUSANDS OF DOLLARS TO COLLECT, THAT CANNOT POSSIBLY BE DIGESTED, THAT IGNORE THE SPECIAL SITUATIONS PREVAILING IN A UNIVERSITY, AND APPEAR TO US TO BE OVERT AND PLANNED HARASSMENT. AS AN EXAMPLE, TO MEET ONE REQUEST FROM OCR WE SUBMITTED A 600 PAGE DOCUMENT, THREE THOUSAND PAGES OF COMPUTER DATA, AND A STACK OF MANUALS AND SUPPORT MATERIALS. AND WE ARE BUT ONE UNIVERSITY!

THIS LEADS INTO THE NEXT PROBLEM I WISH TO DISCUSS. COMPLIANCE REVIEW PROGRAMS NEVER SEEM TO COME TO CLOSURE! THE EXPERIENCE OF PURDUE UNIVERSITY IN TRYING TO GET A FIRM RESPONSE AS TO WHETHER WE ARE IN COMPLIANCE IS NOT UNIQUE. I HAVE BEEN TOLD, FOR EXAMPLE, THAT MY COLLEAGUES AT OHIO STATE HAVE KEPT A LOG OF THEIR CONTINUING BATTLE WITH OCR AND OFCCP AND THAT IT HAS BECOME A SMALL VOLUME. LET ME DOCUMENT, HOWEVER, OUR CASE THAT NOW SPANS ELEVEN YEARS AND TWO AGENCIES: OCR AND OFCCP.

JUNE 1970 -- SUBMITTED OUR FIRST AFFIRMATIVE ACTION PROGRAM ALONG WITH OTHER MATERIAL TO CONTRACT COMPLIANCE OFFICER, OFFICE FOR CIVIL RIGHTS, CHICAGO.

JULY 16, 1970 -- RECEIVED REQUEST FOR LARGE QUANTITY OF ADDITIONAL DATA FROM OCR. LETTER OF REQUEST ALSO STATED, "WE CONTEMPLATE BEGINNING THE ON-SITE REVIEW WITHIN THE NEXT 30 DAYS. WE WILL COMMUNICATE WITH YOU BY TELEPHONE REGARDING THE EXACT DATE."

JULY 28, 1970 -- SUBMITTED DATA REQUESTED JULY 16. WE HEARD NOTHING FOR THREE YEARS!

JUNE 1973 -- RECEIVED REQUEST FOR LARGE QUANTITY OF DATA FROM OCR, AND SUBMITTED 600 PAGES OF MATERIAL IN RESPONSE.

SEPTEMBER 1973 -- RECEIVED LETTER FROM CHICAGO OFFICE THAT "AN ON-SITE REVIEW OF THE PLAN WILL BE NECESSARY. WE WILL CONTACT YOU SHORTLY TO SET A REVIEW DATE." THIS TIME, OCR DID FOLLOW THROUGH WITH AN IRREGULAR SERIES OF VISITS TO HE CAMPUS STRETCHING OVER TWO YEARS, CULMINATING IN A CONCILIATION AGREEMENT IN JUNE 1975.

APRIL 1976 -- SUBMITTED A COMPLETELY NEW AFFIRMATIVE PROGRAM AND

SUBSEQUENTLY SIGNED ANOTHER AGREEMENT WITH OCR.

NOVEMBER 1977 -- PRE-AWARD REVIEW. IN AN INCREDIBLE REVERSAL, THIS TIME AN OCR TEAM DESCENDED ON THE CAMPUS, AND IN A FEW WEEKS OF WHIRLWIND MEETINGS, AND UNDER THREAT OF CONTRACT SUSPENSIONS, AN AGREEMENT WAS HAMMERED OUT LITERALLY AT THE 11TH HOUR.

MAY 1978 -- INFORMED BY OCR THAT AGREEMENT THEY SIGNED HAD NOT BEEN APPROVED BY OFCCP (BUT NO OTHER ACTION WAS TAKEN). OUR STATUS WAS UNCLEAR - WE WERE LEFT DANGLING.

DECEMBER 1978 -- A NEW PRE-AWARD REVIEW INITIATED BY OFCCP.

JANUARY-APRIL 1979 -- OFCCP STAFF PAID SPORADIC VISITS TO THE CAMPUS. SHOW CAUSE ORDER ISSUED. REAMS OF DATA SUPPLIED. IMPORTANT FEDERAL CONTRACTS DELAYED.

MAY 1979 -- OFCCP STAFF LEFT CAMPUS WITH A GREAT BULK OF ADDITIONAL DATA. FEDERAL CONTRACTS REINSTATED, BUT NO REASON GIVEN.

THEN FROM MAY 1979 THROUGH FEBRUARY 1981, WE HAD NO WORD FROM OFCCP. ONCE AGAIN, WE WERE IN LIMBO.

MARCH 1981 -- NOTIFIED THAT SHOW CAUSE ORDER WITHDRAWN AND COMPLIANCE REVIEW BEGUN IN DECEMBER 1978 HAD BEEN CANCELED. I WONDER WHAT

PURPOSE WAS SERVED BY GENERATING THE BOXES AND BOXES OF DATA, AND PRINTOUTS - WAS IT EVER READ? WAS IT REALLY ANALYZED?

ONE MIGHT ASK WHY A UNIVERSITY PUTS UP WITH THIS BARRAGE FROM OFCCP. THE ANSWER IS SIMPLE. HANGING OVER OUR HEADS IS THE TREMENDOUS THREAT OF WITHDRAWING ALL FEDERAL SUPPORT. IF THIS WERE TO HAPPEN FOR EVEN A SHORT PERIOD, IT COULD PUT CRITICAL RESEARCH AND TRAINING INTO A COMPLETE STATE OF DISARRAY. WE OBLIGINGLY COMPLY.

NOW WHAT CAN BE DONE TO CORRECT SOME OF THESE PROBLEMS? THE ANSWER SEEMS STRAIGHT FORWARD.

1. DO NOT ATTEMPT TO DO THE WHOLE AFFIRMATIVE ACTION JOB AT ONE TIME FOR ALL INSTITUTIONS. AN INTERNAL REVENUE APPROACH MIGHT MAKE SENSE. SELECT BY RANDOM CHOICE OR BY SOME TRIGGERING MECHANISM CERTAIN INSTITUTIONS FOR A MEANINGFUL, CAREFUL AUDIT. AND THEN CLOSE IT! WITHOUT A NEW APPROACH, OFCCP CREDIBILITY WILL CONTINUE TO DECLINE.

2. TRAIN PERSONNEL TO BE SENSITIVE TO THE UNIQUE CHARACTERISTICS OF VARIOUS INSTITUTIONAL GROUPS. IN THE CASE OF UNIVERSITIES, ASK FOR THEIR HELP IN DOING THE JOB.

3. DROP THE ADVERSARY POSTURE. ASSUME, FOR ONCE, WE HAVE THE SAME OBJECTIVES. OFFER HELP BEFORE PLACING BLAME.

4. COME UP WITH SENSIBLE DATA GATHERING SYSTEMS. CAMPUS AFFIRMATIVE ACTION OFFICERS WOULD BE MORE THAN WILLING TO WORK WITH OFCCP ON THIS PROBLEM. ALSO, SPECIFY REASONABLE TIMES FOR DATA GATHERING. THE CURRENT PRESSURES ON A UNIVERSITY TO MEET SHORT-TIME DEADLINES IS UNBELIEVABLE.

WHAT WE ASK FOR IS SIMPLE IN PRINCIPLE. BEFORE REGULATIONS AND GUIDELINES ARE DRAFTED AND IMPOSED UPON UNIVERSITIES AND COLLEGES, CONSULT US. LET US FIRST REASON TOGETHER AND THEN PROCEED. THE IRONY WE FACE IS THAT THE OBJECTIVES OF THE FEDERAL GOVERNMENT AND THE UNIVERSITY COMMUNITY ARE THE SAME. BOTH ARE COMMITTED TO AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY IN THE DEVELOPMENT AND USE OF HUMAN RESOURCES.

PROBLEM AREAS - OFCCP ENFORCEMENT PROCEDURES

Though we are citing a number of problem areas, there must be no misunderstanding as to our total commitment to the principles of affirmative action, and to our support for agencies in their efforts to carry out their mandate.

Below is a summary of some of the problems with OFCCP enforcement procedures which compromise the effectiveness of our affirmative action program. Many of the problems stem more from rigid or insensitive application of the regulations by individuals than from the regulations themselves.

(1) Inconsistent enforcement of guidelines by the various OFCCP Regional offices.

(2) Concentration on the punitive aspects of compliance, rather than our new opportunities won for protected classes.

(3) Demands for massive amounts of data which often appear unreasonable or unnecessary during a compliance review.

(4) The seeming inability to bring compliance reviews to timely closure.

(5) The growing adversary relationship between OFCCP and the University rather than a cooperative and mutually supportive environment.

(6) Pre-occupation with the process of data gathering and analysis, to the detriment of productive action-oriented programs.

(7) Overlap and confusion of the jurisdiction between compliance agencies (OFCCP, EEOC, OCR, etc.).

(8) Serious problems in the interpretation and application of utilization criteria (e.g., the 8-factor analysis, and appropriate availability data).

(9) A tendancy for EOS to interpret the OFCCP guidelines as the law.

(10) Ambiguity concerning OFCCP jurisdiction to resurrect complaint investigations which had previously been closed by other agencies, such as EEOC.

(11) Continuing threatened repudiation by OFCCP of certain standardized reporting formats such as the EEOC-21 and the "Format for Development of an Affirmative Action Plan by Institutions of Higher Education."

(12) Finally, there is a knawing, undefinable feeling of uneasiness that we are slowly but surely drifting away from the original goal of bringing people who had suffered discrimination into the mainstream. Rather, we are pushed into a mode of data generation, paperwork and procedures.

PCB 7/27/81

AUG [illegible] 1981

AMERICAN COUNCIL ON EDUCATION
ONE DUPONT CIRCLE
WASHINGTON, D. C. 20036

OFFICE OF THE PRESIDENT

August 10, 1981

The Honorable Orrin G. Hatch, Chairman
Committee on Labor and Human Resources
4230 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

As President of the American Council on Education (ACE), the major coordinating body in higher education, I am pleased to submit this statement for inclusion in the record of the oversight hearings on activities of the Office of Federal Contract Compliance Programs (OFCCP) currently being conducted by the Senate Committee on Labor and Human Resources.

At the outset, it is important to state that most, if not all, higher education contractors recognize the positive contribution sensible affirmative action programs can make to our efforts to achieve equal opportunity in employment for women and minorities at institutions of postsecondary education. The questions we raise here primarily concern not the existence of Executive Order 11246 but the way it has been enforced against college and university contractors by the Department of Health, Education, and Welfare and now by the Department of Labor.

None of these questions are new. Most were raised in testimony given before the Department of Labor in 1975 and have been repeated on many occasions since. A number were addressed in comments filed by ACE with the Department of Labor in March 1980. Most recently, these issues were raised again in the Regulatory Reform Agenda submitted by the ACE to Vice President Bush on May 1, 1981. (A copy of that submission is attached to this statement.)

Testifying before the Labor Department in 1975, President William G. Bowen of Princeton University said:

> Broadly speaking, the concerns which colleges and universities have had with governmental affirmative action programs to date can be divided into two categories:
>
> 1. Concerns over certain administrative requirements and sanctions, including the nature and amount of data required; the slowness of response to plans submitted; the sense that some of those who have been involved in administering the program have not been sufficiently knowledgeable about higher education; the lack, most noticeably this June, of due process in attempting to determine compliance; and the nature of the only sanction available in the event of a finding of non-compliance--termination of federal support for important programs of education and research.
> 2. Concerns having to do with the basic approach being forwarded with regard to faculty staffing, including the meaning and measurement of "availability" and "underutilization;" the nature and definition of goals and timetables; the concept of "ultimate goals;" the definition and determination of what constitutes "good faith efforts;" and the emphasis to be given to statistical tests of one kind or another.

These two basic concerns remain the overriding enforcement issues identified by college and university contractors today. Never ending compliance reviews, inconsistent agency requirements on a region-to-region basis, requests for duplicative and unnecessarily detailed data, and unjustified invasions of academic freedom and the peer review process continue to characterize much of the OFCCP enforcement effort. Inadequate training of personnel charged with investigating higher education contractors remains a major impediment to effective Executive Order enforcement.

These problems are magnified by an attitude that permeates the agency and contributes to the adversarial nature of current interactions between federal investigators and higher education contractors. All contractors are presumed guilty of Executive Order violations until they prove themselves innocent. This is not just an unfortunate attitude held by some field personnel. It is an attitude embodied in the very rules under which the OFCCP operates.

An example of the "codification" of this presumption is that there is no provision in the Executive Order rules governing compliance reviews and complaint investigations that informs agency employees of the proper actions to be taken when they do not find violations of the Executive Order requirements. The obvious implication is that there is no need for such a provision because OFCCP enforcement staff always will find violations.

In our view the Executive Order enforcement program must be perceived to be fair to be effective. The presumption of guilt embodied in the OFCCP rules and accepted by the agency's staff diminishes the effectiveness of the agency's efforts to obtain voluntary compliance with the requirements of the Executive Order. If a contractor is never rewarded for good faith compliance efforts, there is no incentive for the contractor ever to try voluntarily to comply.

Examples of enforcement problems that are unique to our contractor group, but exemplify the more general problem of inconsistency of OFCCP's enforcement actions from region to region, include the ongoing problems we have had gaining nationwide acceptance by OFCCP investigators of the OFCCP approved "industry specific" format for developing college and university affirmative action plans, and the problems we are now experiencing in obtaining nationwide implementation of former Secretary Marshall's order concerning agency handling of confidential faculty peer review files.

As several college attorneys and ACE's assistant general counsel pointed out to Weldon Rougeau in a March 1980 letter addressed to him as Director of OFCCP, there are important and convincing reasons for the continued acceptance of the "industry specific" Format for Development of an Affirmative Action Plan by Institutions of Higher Education that was developed under the auspices of OFCCP in 1975. Higher education institutions vary significantly from other contractors in that they are not-for-profit entities that operate in most cases on a shared governance theory and produce a "product" that can only be evaluated in qualitative terms. The tenure system which is essential to maintaining the quality of education provided at our nation's colleges and universities is unique to higher education employers. The 1975 Format recognized the problem of low turnover among faculty which is inherent in the tenure system. This problem has been exacerbated since 1975 by passage of federal and state "age" discrimination laws prohibiting mandatory retirement and by the generally dismal economic situation in this country. The 1975 Format, while admittedly not perfect, recognized this and other special problems of higher education contractors in specifying how a university affirmative action plan could be developed.

Despite the fact OFCCP was directly involved in writing the 1975 Format, after Executive Order enforcement authority was consolidated in OFCCP in 1978 a number of OFCCP's regional and national office staff refused to accept university affirmative action plans written in conformance with the 1975 Format. These officials asserted only plans written strictly in conformity with the technical requirements of Revised Order 4 as described in the OFCCP Compliance Manual were satisfactory under Executive Order 11246.

After discussions with senior OFCCP staff in spring 1980, it was agreed that, although OFCCP planned to revise the 1975 Format, it would continue to accept plans written on the existing Format until such revisions were completed. This should have eliminated any confusion in the regions regarding the status of the 1975 Format. However, ACE recently learned that just this spring a major southern university was required by a regional OFCCP staff person to revise its affirmative action plan (developed in compliance with the 1975 Format) to conform to the regional official's belief that an acceptable affirmative action plan must track the OFCCP Compliance Manual exactly. The regional official's only previous experience was with traditional industry contractors. He refused to accept the validity of the 1975 Format as a model for acceptable university affirmative action plans. The unnecessary revisions he required the university to make cost over $40,000.

We are now also experiencing regional differences in the manner in which OFCCP compliance officers handle questions regarding treatment of confidential faculty peer review files gathered in the course of Executive Order compliance reviews. University contractors have a legitimate concern about the availability of such records to the public at large under the terms of the federal Freedom of Information Act. A carefully negotiated procedure contained in a consent order entered by then Secretary Marshall against the University of California at Berkeley mitigates to some extent these concerns. Some regional officials recently have refused to sign conciliation agreements that contain verbatim the language of the Berkeley order. This is the case despite the existence of an unrescinded directive by former Secretary Marshall to the Assistant Regional Administrators that instructs them to protect to the greatest extent possible the privacy of these important records.

These two examples are only representative of the kinds of enforcement difficulties higher education contractors have experienced over the years. What is most troubling about these problems and others we have identified is the fact that our repeated efforts to remedy them have been notoriously unsuccessful. We have volunteered to assist in OFCCP staff training but have never been invited to do so. We have made line by line comments on proposed rules, but those comments have been ignored. It remains, however, our fervent hope that these vexing enforcement problems can be solved so that we may direct our energies and resources from these problems to the goal the Executive Order was written to underscore--achieving real equality of opportunity for all employees and applicants at institutions in our contractor group.

Cordially,

J. W. Peltason

J. W. Peltason

JWP:ec

This letter is submitted on behalf of:

American Association of State Colleges and Universities
American Council on Education
Association of American Universities
College and University Personnel Association
National Association of College and University Business Officers
National Association of Independent Colleges and Universities

(Note: In the interest of economy, a publication submitted for the record by the American Council on Education entitled "Regulatory Reform Agenda," dated May 1, 1981, was retained in the files of the committee due to its voluminous content.)

AMERICAN COUNCIL ON EDUCATION
ONE DUPONT CIRCLE
WASHINGTON, D.C. 20036

DIVISION OF GOVERNMENTAL RELATIONS
(202) 833-4736

September 14, 1981

James W. Cisco
Acting Director
Division of Program Policy
Office of Federal Contract Compliance Programs
Room C-3324
U.S. Department of Labor
Washington, DC 20210

Dear Mr. Cisco:

This letter is submitted on behalf of the American Council on Education, the American Association of State Colleges and Universities, the Association of American Universities, the College and University Personnel Association, the National Association for Equal Opportunity in Higher Education, the National Association of Independent Colleges and Universities, and the National Association of State Universities and Land-Grant Colleges. Together these associations represent nearly all of the higher education institutions that are federal contractors as well as large numbers of university administrators concerned with various aspects of Executive Order enforcement.

This letter responds to the advance notice of proposed rulemaking and the amendment that appeared in the Federal Register on July 14 and August 12, 1981. It addresses questions regarding the efficacy of the eight factor analysis in determining availability, the appropriateness of the manner in which job groups are and should be defined, and the legitimacy of back pay as a remedy for violations of Executive Order requirements. For the most part, the questions posed by the OFCCP and, consequently, our answers assume that the general structure of the goal-setting process mandated by the Executive Order rules will remain fundamentally unchanged. We believe there are good reasons to review critically the appropriateness of the current mechanistic concept of availability particularly as it is applied to university faculty, and we would encourage OFCCP to undertake such a review.

While the eight factor analysis can be a useful tool in building a successful affirmative action program, OFCCP equal opportunity specialists tend to credit this particularly loose analytic framework with a scientific precision that is unwarranted given the accuracy and reliability of the data on which it is based. As detailed a measure as the eight factor analysis purports to be, it in fact delivers to university contractors little information on actual availability of women and minorities for employment in particular institutions.

For a variety of reasons, this is especially true for faculty positions.[1] For one thing, availability may vary significantly according to the specialization required for each departmental slot. In addition, there are real disparities in the abilities of different institutions to attract and retain women and minorities due to a range of significant recruitability factors (for example, geographic location, institutional salary, and community environment).[2] This means the faculty availability figures for women and minorities produced using the eight factor analysis either may be understated or overstated depending on the ability of the college to "sign" those faculty members whom it recruits. Goals established on such an infirm foundation cannot withstand the weight of OFCCP's current reliance on them. Either the means of setting them or the manner in which they are used needs to be modified.

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[1] The University of North Carolina's comments in response to the advance notice provide a more detailed description of the problem of determining faculty availability. Letter to James W. Cisco from Jeffrey H. Orleans, August 25, 1981.

THE EIGHT FACTOR ANALYSIS

The advance notice of proposed rulemaking published on July 14, posed seven questions regarding the eight factor analysis. Each of these questions is addressed in turn below:

1) *Which of the current eight factors should be retained as now written, which should be altered (and how), and which should be dropped entirely?*

This question assumes all eight factors either are or are not appropriate for assessing availability across all job groups. The fact is the factors that realistically should be considered in determining availability vary widely depending on the skills and experience required of employees in any particular job group. A greater number of the eight factors are relevant to determining availability for jobs requiring little or no developed skill or experience than are relevant to determining availabiltiy for jobs requiring substantial education or particularly well developed technical skills.

The current rules recognize the need for flexibility in applying the eight factors in any availability analysis. The current rules only obligate a contractor to "*consider*" each of the eight factors in determining whether underutilization exists in a job group. The rules do not direct a contractor to undertake a complete analysis of each factor in every circumstance. However, many of OFCCP's equal opportunity specialists fail to recognize the need for flexibility that the current rules endorse, and this has led to rigid, mechanistic enforcement which diminishes the effectiveness of the Executive Order program and involves contractors in producing needless and burdensome paperwork. Consequently, unless the OFCCP regulations are modified to state explicitly that not all factors are relevant to *all* job groups and amended to limit a contractor's obligations to explaining which of the eight factors were used in determining underutilization in a particular job group and why, it is our view the number of factors listed in the rules should be severely limited.

The only factor that university contractors agree is useful for assessing availability of both women and minorities across *all* job catagories is factor 5 in the minority availability analysis and factor *4* in the female availability

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[2] For example, a continuing study of communications and fine arts faculties suggests differences between women and men and among persons of different racial backgrounds on questions of mobility and other job factors related to availability. Higgerson and Hinchcliff, *Recruitability Factors for Locating and Hiring Qualified Females and Other Minorities for Academic Units Within Communications and Fine Arts*, Southern Illinois University, 1981.

For these reasons, while availability figures derived from Census data will be useful, Census data must not under any circumstances become the sole accepted source of occupational figures for contractors conducting availability analyses. Other sources of data updated more frequently than the Census should be preferred wherever they provide a reasonable basis for estimating availability. For example, with respect to higher education contractors, OFCCP recognized in the 1975 Format for Development of an Affirmative Action Plan by Institutions of Higher Education (the 1975 Format) that in estimating availability for job groups for which a specific educational degree is a requirement for employment, annual survey data containing characteristics of that year's graduates may provide more accurate estimates of availability than could the Census. Use of such annual data on earned degrees avoids the problem of timeliness of information that is inherent in use of Census data.

Another (so far unexploited and inaccessible) source of current occupational data that could be used by contractors in calculating availability is the employment information contractors are required to submit regularly on EEO-1 and EEO-6 forms. The Equal Employment Opportunity Commission and OFCCP should assign the highest priority to aggregating and publishing this data as soon as it is received. The federal government could alleviate any possibility that use of this data could perpetuate industry-wide discrimination by checking the employer-generated data against the Census data and examining carefully the reasons for any substantial disparities that the cross-check revealed. Occupational data derived from these employer-generated figures has three distinct advantages over the Census data: 1) it can be updated frequently (annually for the EEO-1 and biennially for the EEO-6); 2) the statistics on women and minorities in each job group may be more reliable than the Census figures because in categorizing employees by race, ethnicity, and sex the employers work with standardized definitions of both the occupational categories and racial and ethnic groups; and 3) the availability figures may be more accurate because, if carefully developed and monitored, the job groups by which employers report data on the EEO-1 and EEO-6 forms may reflect more accurately the hiring pools of the contractors than the Census occupational codes.

Contractors should continue to be able to choose the data they consider most relevant to their workforces from among the various sources of availability figures. To assure itself of the reliability of data sources other than federally produced Census or EEO-1 or EEO-6 figures, OFCCP should set up industry-wide panels to identify and recommend any existing specialized sources of availability figures useful to employers in various industries. If in calculating availability a contractor uses Census data, federally produced EEO-1 or EEO-6 reports or any approved specialized data source (or any reasonable combination thereof), the contractors methodology of calculating availability should be presumed to comply with any Executive Order requirements.

analysis, i. e., the number of women and minorities in the area in which the contractor can reasonably recruit who have the requisite skills for the job group being analyzed. Factor 3 of the eight factor analysis for both minorities and women (the availability of women and minorities having requisite skills in the immediate labor area) is a lesser included factor in factors 5 and 4 above and should be merged into the broader standard. There is no other factor that usefully can be applied across the board in determining whether underutilization exists.

While such data may be helpful in developing meaningful availability figures for unskilled or semi-skilled jobs, population, unemployment and local workforce figures (the subjects of factors 1, 2 and 3, and 1, 2 and 5, respectively of the minority and female eight factors) are simply irrelevant to any determination of availability of women and minorities for professional and executive level positions including faculty, technical and research staff, professional librarians, and senior administrative staff. University contractors should not be obligated to go through the meaningless exercise of explaining why population figures and the like are not used in assessing underutilization in such job groups.

Most university contractors question the relationship of potential availability factors to any valid analysis of current availability. For this reason, although many university contractors would endorse including training and career development programs among their "action-oriented programs... designed to attain established goals," few believe factors 7 and 8 of the minority and female analysis are relevant to an analysis of the current availability of women and minorities for university employment. At a minimum, because of the duration and nature of training necessary to become minimally qualified, these factors are meaningless in the context of faculty employment. Factors 7 and 8 relate only to the demographics of a future applicant pool and provide no information about the pool of people from which current employees were or could be selected.

2) How should use of the 1980 Census be incorporated into the analysis of availability?

The information provided by the 1980 Census almost certainly will be the most extensive and most current overall occupational data available at the time it is published. If aggregated nationally and by Census regions, states and standard metropolitan statistical areas, the Census data probably will constitute the best single source of availability figures for non-faculty positions for the next three to five years. However, the usefulness and reliability of this data for the second half of this decade, across all contractors and for faculty positions is limited by certain problems inherent in the nature of the Census itself.

First, the Census data is not updated during the decade after it is collected. Over the decade, the data becomes less and less reliable as an accurate picture of the population or the workforce. Second, the occupational data is collected almost entirely through self-identification. Although the data is reported accompanied by clear definitions of the occupational codes, the Census Bureau did not provide individual survey respondents with standardized definitions of each of the occupational categories. Therefore, there is no way of knowing exactly how accurate a picture of the workforce the Census data actually presents.

If in calculating availability a contractor uses Census data, federally produced EEO-1 or EEO-6 reports or any approved specialized data source (or any reasonable combination thereof), the contractors methodology of calculating availability should be presumed to comply with any Executive Order requirements.

3) What methods should contractors and OFCCP use to update data each year?

OFCCP can best serve contractors by developing availability data from employer reported information and updating it as frequently as possible. OFCCP should produce annual updates of EEO-1 data and biennial updates of EEO-6 data if at all possible. However, OFCCP should not require all contractors to update all of their in-house availability figures yearly.

The frequency with which contractors need to recalculate availability data varies significantly from industry-to-industry and from job-to-job. Rates with which employees "turnover," the speed with which changes in the composition of persons enrolled in training programs are taking place and other similar trends determine how "current" availability figures need to be to provide a reliable picture of actual availability.

It seems unlikely there is any job category for which a yearly update is absolutely required to ensure the validity of a contractor's goals. The extremely low turnover among university professors makes annual adjustment of faculty availability figures by higher education contractors a completely unwarranted waste of scarce resources. OFCCP should cooperate with industry representatives in developing trend data that would be useful in setting industry specific guidelines for frequency of OFCCP required in-house reviews of contractor availability figures.

4) Should OFCCP consider establishment of standardized job groups (e.g., the occupational categories for which information was gathered for the 1980 Census)?

The answer to this question is an unqualified no if OFCCP intends at the same time to continue to view the goal setting process as one that produces results the level of confidence in which is so high they warrant a presumption of noncompliance if they are not 95% achieved.

No set of standard job groups (and for higher education contractors particularly not the Census occupational catagories) will match perfectly any contractor's workforce. This means the resulting availability and utilization analyses will provide only very loose estimates of availability and underutilization. Goals based on these estimates can be viewed only as the most general targets. Contractors cannot be held closely accountable for meeting such goals.

The experience of higher education contractors with Executive Order enforcement suggests it is unlikely OFCCP investigators would accept easily a less mechanistic approach to the goal setting process. For this reason and bec standardized job groups are so unlikely to be statistically meaningful to our contractor group, we would not encourage development of nationally standardized job groups at this time.

5) Should OFCCP require a weighted factor analysis or some other specific system? If no one system is required, what evidence should contractors be expected to produce to demonstrate the reliability and integrity of the system they adopt?

OFCCP should continue to permit contractors to weight the factors used in evaluating availability in the manner which makes sense given the contractor's workforce and the nature of the job group for which availability is being calculated. No one weighting system should be required. Flexibility in establishing weights is important to ensuring the validity of the resulting data. The less flexibility the OFCCP allows the contractor in establishing weights the less the OFCCP is justified in holding the contractor accountable for the results.

Contractors should be required to explain the manner in which any required factors are weighted and the reasons for the weights assigned. If the contractor has relied on accepted data sources and used a reasonable method for assigning weights, OFCCP should have the burden of proving the contractor's system is unreliable.

6) What consideration should be given to factors reflecting potential availability?

Potential availability cannot in most circumstances be quantified in any way which makes it meaningful in determining whether a contractor has fully utilized women and minorities in the contractor's current workforce. For most skilled positions, data developed to reflect potentially qualified applicants is totally unreliable. Primarily this is because, unless the data used is enrollment data in specific vocational training programs, the use of this data assumes the employer can draw people into the jobs in question. Also, potential availability figures tend to drastically overstate availability because they do not take into account the years required to gain requisite skills and the fact that many people may not complete the training or take different jobs. While rough estimates of future availability may be helpful in drafting action programs, to the extent OFCCP continues to view underutilization as tantamount to discrimination, such unquantifiable factors have no place in any required availability analysis.

7) What steps, if any, can the contractor undertake to increase the participation of women and minorities in occupations in which they traditionally have not been employed?

Contractors are obligated by the equal opportunity clause in their federal contracts to ensure that all educational, training, staff development, and apprenticeship opportunities are offered to employees in a nondiscriminatory manner. Good faith implementation of this requirement coupled with educational activities directed at incumbent personnel will eliminate many of the barriers that historically have confronted women and minorities seeking so-called nontraditional jobs. Special efforts by employers to identify and encourage women and minorities among their workforce to consider nontraditional jobs may be required where evidence shows the employer previously participated in discouraging women and minorities from seeking such employment.

The ability of many contractors to implement special training programs where they do not now exist is severely limited by the employers' size and available resources. Government tax and employment incentives, and awards in recognition of successful, innovative ideas and educational programs would help encourage such contractors to undertake the added costs of programs specifically designed to provide women and minorities the opportunity to obtain the requisite skills for nontraditional jobs in their workforces. For higher eudcation contractors, continued funding of the federal education and fellowship programs for women and minorities in engineering and the sciences is a government effort that is critical to the future availability of women and minority candidates for "nontraditional" faculty and research jobs in college and university departments of chemistry, biology, physics, and engineering.

Job Groups

The August 21 amendment to the advance notice of proposed rulemaking posed five questions regarding the current regulation on job groups. Following is a response to each of them:

1) Should the current regulation on job groups be changed? If so, in what ways?

The current regulation defines job groups as "one or a group of jobs having similar content, wage rates and opportunities." This definition has been interpreted as mandating that all three of these factors and only these three factors be considered by a contractor in grouping jobs. Nearly all of the problems higher education contractors have experienced in implementing the current regulation on job groups would be alleviated if "content," "wage rates," and "opportunities" were treated as examples of factors contractors could consider in grouping jobs rather than as required, exclusive elements of permissible job groups.

Increased flexibility in selecting factors to be used in constructing job groups would assist contractors in setting and implementing goals. Exclusive use of the three factors included in the current rule can result in job groups that bear little relationship to employee classifications currently in use by the contractor or to existing lines of authority. Such disparities mean the Executive Order job groups have little if any relevance to the day-to-day operations of the contractors and are not well understood by, or are outside the control of, line supervisors. Such circumstances make it more difficult to achieve affirmative action objectives.

Goals established using job groups that are meaningful to the contractor's workforce are easier to implement effectively. If, for example, contractors were permitted to consider lines of authority in constructing job groups, they would be better able to assign responsibility for meeting goals, to reward supervisors whose departments achieve goals and to encourage or induce compliance by those supervisors and managers whose departments or units fail to meet affirmative action objectives.

Also, goals have greater validity when the availability data factored into the utilization analysis is more reliable. Greater flexibility in grouping jobs would permit contractors to develop more refined job groups that reflect the nature and sources of availability data.

Obviously, job groups used by contractors in conducting utilization analyses must serve the purposes of the government's affirmative action requirements. OFCCP can afford contractors greater flexibility in defining job groups without compromising this objective by substituting for the current rule the following language:

> ...("job groups" are usually comprised of a job or a group of jobs that have similar content, wage rates and opportunities. However, jobs may be grouped using other factors such as requisite skills, organizational structure or employee classification systems in addition to or in lieu of wage rates, content or opportunities if the use of such other factors is demonstrably related to achieving the purposes of an affirmative action program).

2) If a new regulation is developed should it be expressed in general terms similar to the current regulation or should it specifically detail how job groups must be formulated?

Any rule that is developed regarding job groups should be expressed in terms that are general enough to permit development of job groups that bear a logical relationship to a contractor's workforce. Flexibility in grouping jobs is essential to developing realistic goals and implementing them. Even in the same industry, there are reasonable variations in job groups that reflect the fact that there exist more detailed availability figures for large urban areas which permit metropolitan area contractors to make finer distinctions in grouping jobs than contractors in rural areas can reasonably make. Also, the size of a contractor's workforce may determine the number of factors the contractor can realistically use in determining job groups. A small contractor may only be able to use one factor, e.g., job content, in grouping jobs because use of additional factors would create unacceptably small groups.

3) Should job groups be formulated by some means other than content, wage rate and opportunity...? In formulating job groups, should higher level jobs be grouped with those which serve as a promotional pool?

As mentioned above, the existing criteria for grouping jobs would be satisfactory if applied flexibly.

Consistent with the 1975 Format, higher education contractors routinely group faculty members by departments. Assistant, associate and full professors within the same department are grouped together. These job groups, defined almost exclusively by "job content," include both higher level employees (full professors) and those in the promotional pool (assistant and associate professors

The use of such vertical job groups permits higher education contractors to extablish goals for faculty by administrative unit. Horizontal groupings would require goals to be set across administrative units. The academic governance structure of most universities is very decentralized. This makes it difficult to get cooperation in meeting goals set across departments.

Department by department goals are easier to implement and monitor. The regulation should continue to permit contractors to group jobs vertically where such job groups are consistent with affirmative action objectives.

4) Should a standard be set that would establish a minimum or optimum numbers of incumbents for a job group?

Job groups must be large enough to produce statistically significant data and small enough to avoid where possible the difficulties inherent in implementing goals set across administrative units. Contractors should be permitted to aggregate employees to obtain a job group large enough to be statistically meaningful, but they should not be required to develop job groups containing a specified minimum number of employees. OFCCP may choose to publish figures on the optimum numbers of employees who should be included in a job group but such figures should serve only as general guidelines not as requirements.

5) Should separate standards for job grouping be established for small contractors? Should standards be established for each industry group?

OFCCP's regulation on job groups should be flexible enough and general enough to allow small and large contractors and contractors in particular industri to develop job groups that will permit them to set realistic and achievable goals. OFCCP should not mandate any particular set of standards for any set of contractors large or small. OFCCP should work together with industry representatives to develop industry formats that can serve as guides to contractors constructing job groups.

Back Pay

The Executive Order does not expressly authorize OFCCP to seek back pay or other relief for individual employees or applicants. Given the apparent purpose of the Executive Order, there is a real question whether back pay awards are appropriate or necessary in furthering the government's Executive Order compliance objectives.

The most frequently cited reason for the Executive Order is to serve the government's "vital interest in assuring the largest possible pool of qualified manpower be available for the accomplishment of its projects" because the "exclusion from the available labor pool [of qualified women and minorities] is likely to have an adverse effect upon the cost and completion of government contracts." Contractors Association of Eastern Pennsylvania v. Secretary of Labo 442 F.2d 159, 175 (3d Cir. 1971). Also cited is a purpose analogous to the primary objective of Title VI, Title IX and Section 504 - to ensure federal procurement dollars do not further discriminatory practices prohibited by other laws.

These purposes support directly only current or prospective actions by OFCCP to require contractors to refrain from engaging in discriminatory practices and take positive steps to increase minority and/or female employment and to debar contractors that fail to meet these contractually required objectives. They do not appear to support individual awards of "make whole" remedies such as back pay.

Most higher education contractors agree the OFCCP is without authority to seek monetary relief for individuals where there is evidence only of underutilization and no direct evidence of intentional discrimination.. The OFCCP's concept of an "affected class" is often applied in a way which leads equal opportunity specialists to seek back pay for individuals in situations where the only "proof" of discrimination is a statistical disparity between availability and utilization and goals have not been met. While such evidence may support a claim of a failure to comply with affirmative action requirements which claim if proved would justify debarment, it is insufficient to show intentional discrimination and justify individual relief.

While there is a more plausible argument OFCCP may seek back pay where actual discrimination is shown, it is our view OFCCP should refer to the EEOC for resolution to all such complaints of discrimination (whether individual or class based). The EEOC has the undisputed authority to seek relief for individual under Title VII of the Civil Rights Act of 1964 and/or the Equal Pay Act of 1963. The EEOC and OFCCP have an existing memorandum of agreement providing for referral of such discrimination complaints. We believe contractors and members of protected classes would benefit from having only one effective federal agency prusuing individual relief for discrimination and another federal agency concentrating its resources on monitoring compliance with Executive Order affirmative action and nondiscrimination requirements and pursuing debarment of contracto aggresively and without delay where noncompliance is discovered.

We hope these comments are useful to you in reviewing the rules governing the Executive Order program. If it would be helpful for representatives of our contractor group to meet with you or your staff to discuss these and other compliance issues, please do not hesitate to call me.

Sincerely,

R. Claire Guthrie

R. Claire Guthrie
Assistant General Counsel

RCG:elc

Statement of John W. Hicks,
Executive Assistant to the President, Purdue University,
at August 20, 1975, Fact-Finding Hearing Concerning Revised Order 4
U.S. Department of Labor, Washington, D.C.

Purdue University fully supports the concept of equal employment opportunity and the goal of bringing larger numbers of minority group members and women into University employment at all levels. We are deeply concerned, however, at the implications and possible effects of the attempts by various federal agencies to achieve these goals and of the unreasonable requirements placed on the University and other universities by these agencies.

Our basic concerns fall into four categories:

1. Many of the requirements imposed or threatened to be imposed by the federal agencies do not really reach the heart of the problem and hence, while extremely expensive and onerous to the University, do not result in additional qualified women or minority members coming into the employment pool.
2. If the University is pressured to turn its hiring goals into quotas, the most important single concept of a university--the pursuit of excellence--is threatened.
3. For statistical reasons it is, for all practical purposes, impossible for any single university to achieve the goals it is required to establish and still maintain the principle of hiring the most qualified individual available.
4. The various data compilations required by the federal agencies are immensely expensive to the University in a time of inflation and limited resources, particularly in light of the fact that the compilation of these data add nothing to the pool of qualified prospective employees.

We will treat each of these basic points briefly.

The Heart of the Problem

The basic reason that Purdue University does not employ more minority group members or women is that the pool of qualified individuals in these categories is, both nationally and locally, very limited.

The basic philosophy of the federal agencies appears to be that the reason universities employ few minorities and women is discrimination. This is not the case at Purdue in 1975, and we doubt that it is the case at most other universities.

The reasons for the shortage of qualified individuals among these groups are many, and past discriminatory practices by both individuals and institutions are undoubtedly a very large part of the cause. Today, however, there is a very different social climate, and the main limiting factor is the small size of the pool of qualified women and minority group members available to universities.

Yet none of the data gathering or affirmative action requirements of the federal agencies add one woman or minority group member to this pool. These requirements result only in:

a. shuffling qualified individuals from one institution to another as universities seek desperately to achieve their goals; or

b. pressuring some universities to employ women or minority group members who are less well qualified than other prospective employees.

If the various federal agencies really wish to attack the heart of the problem, they should concentrate their efforts on enlargement of the pool. If all of the efforts and expenditures allocated today to data accumulation, etc., were instead used for graduate fellowships for minority group members and women, the long run effect would be to increase the size of the pool of qualified individuals.

Are Goals Quotas?

Federal agencies have been careful to indicate that goals are not quotas and that universities are still free to hire the most qualified individuals, regardless of the goals set.

The whole process, however, is established in such a manner that the burden falls upon the university of proving that it is not guilty of discrimination if it fails to meet its goals or if it is shown to have "underutilization." In this sense, the university is considered guilty unless it can prove itself innocent. The very term "underutilization" has pejorative connotations and is symbolic of the attitude of the federal agencies.

Under such pressures it is no wonder that some universities have admittedly hired less qualified individuals, in order to increase the number of women or minorities in their employment.

Yet such action is in direct contradiction to a public university's role as a trustee of public funds appropriated to it to be spent as wisely as possible. It is also in direct contradiction to the "pursuit of excellence" to which all institutions of higher education should be dedicated.

A state university like Purdue has a responsibility to the people of the state and to its students to use its resources as wisely and efficiently as possible. This certainly involves employing the most qualified individuals available, regardless of sex or race. Yet pressure of federal agencies has been in the other direction.

Federal agencies have also promoted less than the optimum use of funds by bringing pressures with respect to salaries and wages. Purdue strongly supports the concept of equal remuneration for equal performance in the same job, regardless of sex, age, or race. But "performance" is a key consideration here. Simply because one has been employed as, say, an associate professor in a particular discipline for a given period does not mean that that individual should receive the same salary as other associate professors in the same discipline with the same seniority. Quality of performance also must be recognized. Salary comparisons based on averages do not take performance into consideration, hence are really not valid. Yet they are often used to pressure universities into equalizing salaries in a manner not justified by performance considerations.

The Statistical Facts of Life Concerning Goals

The concept that in the long run the employment pattern at Purdue or any university should, with respect to minority group members and women, approximate the proportions of these individuals found in the national pool or local pool of qualified people is viable only in a very general sense. It is based upon the assumption that abilities do not vary based on race, sex, or ethnic background, an assumption which we accept. The real question of concern is how closely the University will be expected to attain these goals.

Even if employees in each department were selected from the qualified pool on a random basis, the chances that the employment pattern in each department would reflect the total population of the pool are minuscule. For all of higher education in the nation, one might expect, over time, the number of women and minorities to approximate the numbers in the national pool of qualified persons. But for each department of any one university such an expectation is ridiculous. Further, if any one institution exceeded its proportion of any group, it would be impossible for all other institutions to attain their proportions (assuming they used the same availability data).

Beyond this, employees are not selected at random. Whenever a position at a university is to be filled, the university must select the prospective employee from a limited number who are then available for the position. In each such case, it is the responsibility of the institution, to its students and to the taxpayers who support it, to select the most qualified person, regardless of race or sex. Again, in the long run for all of higher education, this should result in proportions of various groups approximately proportional to the pool of qualified persons. But for any individual institution, this cannot be expected.

Nor do prospective employees choose their employment opportunities on a random basis. Each has preferences as to geographic location, nature of the institution, reputation of the particular department, salary, and so forth. Regardless of the goals established, factors such as these may make it impossible for an institution to achieve its goals.

A university's commitment to the goals which it establishes must be understood in the light of these considerations. The university should make a good faith effort to increase the number of women and minorities it employs:

1. Information concerning vacancies should be given wide public distribution so that a broad spectrum of individuals may be considered if they are interested.
2. Consideration should be given to all individuals applying for a position, based upon their qualifications for the position.
3. No factors which discriminate on the basis of sex, race, or ethnic background should be utilized in the selection process.
4. In instances where all other factors are equal, preference should be given to women or minority group members, but only in such instances.

In making final employment decisions, however, the university should select the most qualified individual, as determined by the judgment of appropriate administrative officials of the university. While over a period of time such a process should move in the direction of attaining the goals established, it cannot be expected that each departmental goal will be exactly fulfilled.

The Costs Involved

The costs of data compilation required by the federal agencies are extremely high. Without exaggeration, it can be said that a university the size of Purdue has to spend hundreds of thousands of dollars each year to provide the information required to be in compliance with its affirmative action program.

This is particularly disturbing since, as indicated above, this expenditure results in not one additional woman or minority group member being added to the pool of qualified prospective employees. It is even more disturbing when it appears that much of the data collected has no sound statistical basis and that inferences based upon the data are often invalid. The use of invalid analysis to prove an institution is not in compliance is indefensible, yet this is exactly what is taking place.

In summary, it can be said that the requirements established by the federal agencies with regard to acceptable affirmative action programs on the part of universities are a bureaucratic nightmare, which do little to solve the real problem.

Some Positive Suggestions

There are, of course, some positive steps which can be taken to insure that institutions are following non-discriminatory employment policies and making a good faith effort to attract more women and minority group members.

1. Certainly it is appropriate for the federal government to require that all personnel policies of the universities are fair and equitable and contain no provisions that discriminate on the basis of sex, age, race, etc.

2. Institutions should be required to report annually the numbers of women and various minority group members in employment. Attention should be given, however, to total employment, probably divided into not more than four categories: (1) faculty, (2) administrative and professional, (3) service, (4) clerical. For the statistical reasons discussed above, a further breakdown by departments is not practical. Institutions should be expected to show reasonable progress, over time, in the employment of women and minorities, and to move toward general goals based on the pool of qualified workers available to the institution. This will vary with type of institution, location, etc.

3. In hiring, universities should be expected to give broad dissemination of information concerning job openings, so that female and minority candidates have an opportunity to be considered.

4. In determining compliance with an affirmative action program, special weight should be placed upon the institution's efforts to increase the pool of qualified prospective employees. Such efforts include:

    a. Attempts to attract additional women and minority group members into undergraduate and graduate programs and to help insure their success in completion of these programs.

    b. Hiring of women and minority group members at entry level positions and providing on-the-job training and experience to qualify them to move up.

These are the types of efforts which will eventually solve the basic problem of too few qualified people.

We note that in his recent (June 19) testimony before the House Subcommittee on Equal Opportunities, Secretary of Labor Dunlop questioned the value and reliability of the various data, data collection systems, and reporting requirements currently required of government contractors. We would respectfully suggest that, so far as our colleges and universities are concerned, the basic need for data and statistics--both as to professional and nonprofessional employees--will be met by the newly designed and published EEO-6 forms ("Higher Education Staff Information Reports") and that future compliance monitoring should emphasize factual (as opposed to unrealistic "statistical") inquiries as to whether the university "...followed its affirmative action program," as the true test of whether "...it has complied with the letter and the spirit of the Executive Order."

In all of these efforts, the federal agencies should constantly remember that the basic function of a university is learning and teaching, not to employ women, blacks, native Americans, physically handicapped, veterans, etc. A university should, of course, do all these things in a fair and nondiscriminatory fashion, as qualified individuals are available. But the pursuit of new knowledge and its dissemination to all who seek to learn is the real job of a university, and federal bureaucracy should not be allowed to subvert this purpose, as it has in recent years.

The **Chairman**. Our next witness will be Carol Burroughs Grossman of the Women's Equity Action League, WEAL, here in Washington, D.C.

Carol, we are happy to have you with us and look forward to having your testimony. I might mention that we were happy to finally resolve that problem with the Women's Educational Equity Agency. It was not an easy problem to resolve, but we finally resolved it in a manner that I think was pretty satisfactory under the circumstances. At least we hope so.

Ms. **Grossman**. Yes, and we thank you for your help in that.

The **Chairman**. Thank you.

Go ahead and we will be happy to take your testimony.

STATEMENT OF CAROL BURROUGHS GROSSMAN, NATIONAL PRESIDENT, WOMEN'S EQUITY ACTION LEAGUE, WASHINGTON, D.C.

Ms. **Grossman**. Mr. Chairman, thank you for the opportunity to bring before you the views of the Women's Equity Action League on the operation of the Office of Federal Contract Compliance Programs, OFCCP, in enforcing Executive Order 11246, as amended.

I am Carol Grossman, national president of the Women's Equity Action League, known as WEAL. Founded in 1968, WEAL is a national organization dedicated to securing and protecting women's rights through research, public education, litigation, and legislative advocacy.

It is also pertinent to my testimony that professionally I am an equal opportunity specialist currently on leave of absence from Wayne State University in Detroit, Mich. I specialize in affirmative action programs under the Executive order and have had primary responsibility for the development and implementation of such programs including data generation, presentation, and analysis. I also do casework relating to all antidiscrimination laws and regulations such as title VI, title VII, and title IX.

As you know, WEAL has long been associated with the promotion of women's employment rights in educational institutions. Indeed, WEAL was the first organization to file complaints of sex discrimination against the academic community through the contract compliance program. We alone have filed more than 300 Executive order complaints since 1970.

In addition, the Women's Equity Action League was the lead plaintiff in a lawsuit filed in 1974 against both the Department of Health, Education, and Welfare and the Department of Labor for failure to enforce the laws and regulations under their charge, including the Executive order.

A consent order was entered in the case in 1977, requiring the agencies to handle compliance reviews and complaints of violations according to certain standards and within certain timeframes. Because of the Agency's lack of compliance with the order, it has been necessary for our attorneys to return three times to the court which monitors enforcement of this order, most recently in June of this year.

The Office of Federal Contract Compliance Programs has consistently failed to meet basic obligations to complainants—notification, investigation, and resolution—within any reasonable timeframe and with any degree of reliability, notwithstanding the court order.

It would appear, therefore, that we are the perfect counterpart to the industry representatives who testified before us yesterday, the testimony of which I read. In fact, I suspect sometimes that we were invited with the expectation that we would reiterate and, indeed, expand upon our 10 years of criticism of OFCCP's performance.

If that is the case, I am sorry to disappoint you. We refuse to be put in the position today of driving yet another nail in the coffin of an agency which needs to be strengthened, not buried, albeit with tender loving care.

Testimony before this committee has charged that OFCCP's failure is a result of bureaucratic overkill, particularly extensive reporting requirements, and a rigid confrontational posture in dealing with Federal contractors. We could not disagree more.

None of these criticisms accurately pinpoint the most important problems associated with OFCCP's compliance efforts. The failure of the OFCCP to effectively enforce the executive order program is a result of a lack of commitment on the part of any administration to full implementation of the program. The chief limitations which remain to be addressed by OFCCP are insufficient personnel with inadequate training and experience in the academic sector investigation and the absence of a workable management information system.

It is important to distinguish here between criticizing OFCCP for clumsily discharging its enforcement duties and challenging the basic foundation blocks of the executive order program. Let us not confuse examination of the performance of the agency with a renegotiation of its mission. I want to make it clear that our criticism of the past and present performance of the OFCCP should never be misinterpreted as an assertion that Federal enforcement efforts have been totally ineffective and that the executive order program has had no effect. Indeed, I am pleased to note that the testimony to come today seems to be more reflective of both the supporters and the detractors of the program.

I would like to repeat that the Executive order compliance program has not been without some bright spots. The initial vigorous site visits conducted in the early 1970's at several of the nation's most prestigious institutions, notably Harvard, MIT, and Berkeley, served notice on the academic community at large that the Executive order enforcement program was more than a paper tiger.

In addition, notification by OFCCP to hundreds of academic institutions of WEAL's complaints against them stimulated many institutions and their female constituencies to get busy on their programs.

I would like to point out that I was on the staff of MIT at the time of the early 1970's. We were caught unprepared by a site visit, as Dr. Hansen pointed out that Purdue was. However, we went about the task of collecting the information and putting together a very good program. Each department put together its own affirmative action plan and the movement went upwards rather than downwards through the hierarchical structure.

It was not easy, and I must say we had some disagreements with the agency investigators. It was costly, partly because we were unprepared. It is twice as expensive to put together a program in a rapid period of time than it is to put it together over the due course of a year or so.

No doubt spurred on by the WEAL and Adams consent decrees in December of 1977, enforcement activities in the regional offices suddenly took off again in late 1977 and in 1978. I recall, and I know that Dr. Hansen does, the wave of compliance reviews in region 5. It was shortly after I had joined the staff at Wayne State University. These compliance reviews marked a renaissance of enforcement activity in the midwest institutions.

Within a year's time, a great number of institutional preaward reviews were conducted, letters of deficiency issued, and conciliation agreements negotiated. I think it is fair to say that many of these visits "caught the cat napping," so to speak, but also it breathed welcome life into some institutional programs which had grown sluggish with neglect.

I would like to comment here on a couple of problems that Dr. Hansen cited. I agree that there was considerable agency confusion in late 1977 and 1978. I would like to point out to you that was indeed the precise time we were in court against the agency. Some of the conciliation agreements were indeed set aside later by OFCCP that had been negotiated by OCR, primarily because they did not meet all of the requirements of the WEAL consent decree.

We, too, had our program at Wayne State University set aside officially by OFCCP, but we did not take the position that we were left dangling. Indeed, it was a very useful document. We indeed had many things that we needed to do there. We simply went about fulfilling it regardless of whether we were absolutely required to or not.

1978 also marked consolidation of the agencies in which the enforcement powers that were delegated to OCR and Education were returned to OFCCP. There was a great deal of staff shuffle about who was going to be staying with which agency. Indeed, there were a number of investigators—there always have been—who were not sufficiently experienced in education issues and who made crazy remarks about industry and the plant and those things. That is indeed the case.

However, some colleges and universities which were not targeted for early site visits and, as it turned out, were in for a very long wait before WEAL's complaints were to be investigated had, as I said, gone about the business of setting up affirmative action committees, hiring equal opportunity officers, and conducting statistical analyses prescribed by the regulations. These activities gave focus to discussion, negotiation, and complaint resolution within the university communities themselves, often without the necessity to bring Federal enforcement to bear.

We also understand the Chair's sentiments that civil rights and women's rights groups and employers should work together for a change. We have long recognized the value of community based efforts on behalf of women and minorities as being the most desirable avenue for change. However, these change agents must have access to accurate information about the work force in order to monitor progress and policy.

In addition, the requirement of a written affirmative action plan with its numerical workforce analysis and goals and timetables for corrective action has been a valuable tool for those institutions that complied with the executive order provisions despite inadequate Federal enforcement efforts.

While Federal compliance reviews themselves have not always been needed to initiate change in academia, the potential for Federal review has been necessary to provide the impetus for most institutions to develop affirmative action programs. In fact, quiet negotiation and the real fact of voluntary compliance, which has been important to all of us, has often been overshadowed by I think exaggerated reports of threats of debarment and accounts of huge back pay settlements.

The bragging about such settlements to which, Senator Hatch, you referred in your opening remarks yesterday was doubtless brought on by, in fact, our consistent criticism that the agency was more concerned with negotiation, than protecting the rights of women and minorities by utilizing the enforcement tools that they had at their disposal. We continue to believe that without the knowledge that enforcement is possible, little or no voluntary compliance would exist.

As to the problem of excessive confrontation by investigators, I have but one comment. My experience is that the tone of the investigation is as likely to be set by the receiving institution as it is by the agency. Every horror story of inappropriate behavior by an investigative team can be matched by one describing equally bad behavior by a contractor.

The same can be said for the alleged rigidity in the application of the numerical standard. I will not say that investigative teams are identical in the way they treat these numerical indicators, but I have had conversations with representatives from industry who revealed a rather schizophrenic attitude toward quantitative measures of compliance. On one hand, they decried what they saw as the complexity and rigidity of the standard utilization analysis. On the other hand, they would suggest a quick and simple one-step equation by which to determine compliance, a solution which would inherently resist being tailored to individual institutional needs and circumstances.

Employers seem to want certainty and flexibility. I think that is impossible to achieve. Many of those who have testified before us have also complained about inconsistency by the agency in the application of policy and communications with industry. We, too, have complained of such waffling and indecisiveness, usually because complainants are left hanging for long periods of time with no word on the resolution of their case. That is not all that dissimilar to Dr. Hansen's testimony.

It is our feeling that what we regard as necessary flexibility in judging the compliance in various industries, institution's regard is inconsistent application of the law. What we see as unwarranted delays and hedging by agency personnel is believed to be important time for private negotiation and conciliation by employers. The agency, and I think those of us who are on both sides of the fence, have always been torn by these problems and will continue to be so.

In the Executive order program, there is considerable discussion of course, about a great deal of paperwork that is required. The main piece of paperwork required is the affirmative action plan. These written plans are the cornerstone of the program.

Another theme in these hearings has been the general condemnation of the written affirmative action plan as useless. I strongly dispute that assessment. The written affirmative action plan is the best tool devised to date that adequately insures that the institution has made a reasonably comprehensive self-evaluation. I would like to reiterate that it is a self-evaluation of its past and present employment policies and practices.

As Arthur Fleming of the U.S. Commission on Civil Rights has recently pointed out, the numerical utilization analysis is essential to that plan because "it is the best available warning signal that discrimination may be occurring." Similarly, the numerical goals and timetables are the best available method for determining whether an action program designed to combat employment discrimination has proven effective.

Without a written plan, including goals and timetables and a designated people who are responsible for implementing them, affirmative action becomes everybody's problem and nobody's problem. As uncomfortable as it may be that someone must ultimately be responsible for continuing failures to improve the numbers and experience of women and minorities in the work force within an institution, I think it is important that it be that way.

Our commitment to the preservation of required written affirmative action plans as a part of the Executive order program has caused us recently to be alarmed about current changes being promoted by the Department of Labor. We had expected to have the opportunity to bring our concerns to these oversight hearings today, but we have been told that the discussion of these proposals is to be deferred until September or later.

The **CHAIRMAN**. The purpose of these hearings, of course, is to discuss current regulations, but I have no objections if you would like to make some general comments about the proposed regulations. You and I may not totally agree, but we both agree that maybe those proposed regulations are not what they should be.

Ms. **GROSSMAN**. We could do that.

The **CHAIRMAN**. Feel free to do that.

Ms. **GROSSMAN**. One of the problems we have found and on which WEAL has done considerable research, and the statement which I would like to put in the official record, concentrates a little more on this research.

The **CHAIRMAN**. Why do we not put that statement into the record at this point? I have read it. It is an excellent statement from your perspective. Without objection, we will put that in the record so that your views in that regard can be read for those who are interested.

[The statement referred to follows:]

TESTIMONY OF CAROL BURROUGHS GROSSMAN
NATIONAL PRESIDENT
OF THE
WOMEN'S EQUITY ACTION LEAGUE

Mr. Chairman, members of the Committee, thank you for the opportunity to bring before the Committee the views of the Women's Equity Action League on the operation of the Office of Federal Contract Compliance Programs (OFCCP) in enforcing Executive Order 11246, as amended.

I am Carol Grossman, National President of the Women's Equity Action League, known as WEAL. Founded in 1968, WEAL is a national organization dedicated to securing and protecting women's rights through research, public education, litigation, and legislative advocacy. Our membership has long been associated with the promotion of women's employment rights in educational institutions. Indeed, WEAL was the first organization to file complaints of sex discrimination against the academic community through the contract compliance program. WEAL alone has filed more than 300 Executive Order complaints since 1971.

It is also pertinent to my testimony that professionally I am an Equal Opportunity Specialist, currently on leave of absence from Wayne State University in Detroit, Michigan. I specialize in Affirmative Action Programs under the Executive Order and have had primary responsibility for the development and implementation of such programs, including data generation, presentation and analysis. I also do case work relating to all anti-discrimination laws and regulations, such as Titles VI, VII and IX.

WEAL and other groups are very concerned not only about the current operation of the OFCCP but also the proposed regulatory changes in the Executive Order program itself which, we believe, will destroy the credibility as well as effectiveness of the affirmative action effort in academe and other industries covered under the Order.

As you may be aware, the Women's Equity Action League was the lead plaintiff in a lawsuit filed in 1974 against both the Department of Health, Education and Welfare and the Department of Labor for failure to enforce laws and regulations, including the Executive Order, under their charge prohibiting discrimination in educational institutions receiving federal funds.

A consent order was entered in that case in 1977, requiring the agencies to handle compliance reviews and complaints of violations according to certain standards and within specific timeframes. It has been necessary, however, for our attorneys to return three times to the court which monitors enforcement of this order, most recently in June of this year,because of the agency's lack of compliance with the order. The Office of Federal Contract Compliance Programs has consistently failed to meet basic obligations to complainants--notification, investigation, and resolution--within any reasonable timeframe and with any degree of reliability, notwithstanding the court order.

It is now being charged that the Executive Order program failures are a result of bureaucratic overkill; too broad coverage of small as well as large federal contractors; and a rigid, confrontational posture by the Department of Labor in dealing with federal contractors. Moreover, it is asserted that the very foundation of the Executive Order program--the requirement of a written Affirmative Action Plan with numerical goals and timetables--is an inappropriate enforcement tool.

We could not disagree more. None of these criticisms accurately pinpoint problems associated with OFCCP's compliance efforts. The failure of the OFCCP to effectively enforce the Executive Order program is the result of a lack of commitment on the part of any Administration to full implementation of the program. The chief limitations which remain to be addressed by OFCCP are inadequate personnel in numbers, training and experience in academic sector investigation and the absence of a workable management information system.

I want to make it clear, however, that our criticism of the past and current performance of the OFCCP should never be misinterpreted as an assertion that federal enforcement efforts have been totally ineffective and the Executive Order program has had no effect. On the contrary, the federal Executive Order compliance effort has not been without some bright spots. The initial vigorous site visits conducted in the early 70's at several of the nation's most prestigious institutions--notably, Harvard, M.I.T. and Berkeley--served notice on the academic community at large that the Executive Order enforcement program was more than a paper tiger. In addition, notification by OFCCP to hundreds of academic institutions of WEAL's complaints against them stimulated many institutions and their female constituencies to get busy on their programs. In fact it took some time into the middle 70's for both the federal enforcement and institutional program efforts to come to a grinding halt.

No doubt spurred on by the WEAL and Adams consent decrees of December, 1977, enforcement activities in the regional offices suddenly took off again in late 1977 and 1978. I personally particularly recall the wave of compliance reviews in Region V--marking a renaissance of enforcement activity in mid-west institutions. Within a year's time, a great number of institutional pre-award reviews were conducted, letters of deficiency issued, and conciliation agreements negotiated. I think it is fair to say that many of these visits "caught the cat napping", but also breathed welcomed life into institutional programs which had grown sluggish with neglect.

Some colleges and universities which were not targeted for early site visits, and as it turned out, were in for a very long wait before WEAL's complaints were to be investigated, went about the business of setting up affirmative action committees, hiring equal opportunity officers, and conducting the statistical analyses prescribed by the regulations. These activities gave focus to discussion, negotiation and complaint resolution within the university communities themselves, often without the necessity for bringing federal enforcement to bear.

Civil rights organizations have long recognized the value of community-based efforts on behalf of women and minorities as being the most desirable avenue for change. But these change-agents must have access to accurate information about the workforce in order to monitor progress and policy. In addition, the requirement of a written Affirmative Action Plan with its numerical workforce analysis and goals and timetables for corrective action, has been a valuable management tool for those institutions who complied with Executive Order provisions despite inadequate federal enforcement efforts. While federal compliance reviews themselves have not always been needed to initiate change in academe, the potential for federal review has been necessary to provide the impetus for many institutions to develop an Affirmative Action Program. Therefore, threats to that federal enforcement effort and credibility in the form of pending regulatory changes to the Executive Order by the Department of Labor, are of tremendous concern to us.

The Department of Labor has recently published in the July 14 Federal Register a series of questions concerning the appropriateness of back pay awards under the Executive Order program. The mere suggestion that the department might discontinue back pay remedies in the resolution of individual and class discrimination complaints under the Executive Order is hard to believe.

Back pay is a major deterrent to employment discrimination and an essential part of the Executive Order enforcement program.

At present, Executive Order 11246 requires written Affirmative Action Plans for contractors holding at least one federal contract of $50,000 or more. The importance of a written plan with goals and timetables to measure progress in providing equal opportunity cannot be overestimated. The written Affirmative Action Plan is the best tool devised to date that adequately insures that the institution has made a reasonably comprehensive self-evaluation of its past and present employment policies and practices. As Arthur Flemming has recently pointed out, the numerical utilization analysis is essential to that plan, because it "is the best available warning signal that discrimination may be occuring." Similarly, the numerical goals and timetables are the "best available methods for determining whether an action program designed to combat employment discrimination has proven effective."

To reduce their "regulatory burden," however, the Department of Labor now proposes to raise the threshold for institutions required to have a written Affirmative Action Plan from $50,000 to $1 million, thus sharply reducing the number of institutions required to have written plans. At the same time, the Administration intends to eliminate procedures for review of employment policies prior to award of large contracts and to reduce record keeping requirements.

In a May meeting with representives of women's and minority groups, both Secretary of Labor Raymond Donovan and Solicitor of Labor T. Timothy Ryan contended that although the new Executive Order regulations would reduce the total number of contractors required to have Affirmative Action Plans by 66%, 80% of all employees would still be at institutions required to have written plans. Since then, though, the acknowledged estimate of the number of contractors excluded from the requirement of having a written plan has risen to 75%, the Department of Labor still claims no more than 20% of all previously covered employees would now find themselves in institutions lacking such plans. Labor Department officials have further asserted that it is only smaller contractors which are being freed from the "burdensome paperwork" of Affirmative Action Plans and that no no single industry will be disproportionately affected by these changes.

However, using reports from the American Association of University Professors and the Federal Procurement Data System, WEAL has documented that in at least one "industry" subject to Executive Order regulations--academe--the impact will be far more severe than the Administration's figures show. WEAL has found that 219 of the 272 colleges and universities which in 1980 were required to have written plans would be exempted by the new regulations--a reduction of 81%. To put it another way, only 19% of those higher educational institutions which were required to present written Affirmative Action Plans in 1980 would still be so responsible. Excluded from this requirement (had the proposed changes been in effect in 1980) would be some of the largest educational institutions in this country including Yale, the University of Michigan and the University of Southern California. In 1980, for instance, the University of Southern California received over $5 million in aggregate federal contracts, but had no single contract over $1 million which would have required it to have a written Affirmative Action Plan under the new regulations.

It is interesting to note, that in 1978, my home institution, Wayne State University, had a contract over $1 million; according to our data for 1980, it presumably did not. It is conceivable, thus, that in successional years, some institutions might be first over then under the $1 million threshold. Since institutions in this situation would want to remain "ready" to resume federal contractor status whenever the opportunity arose, in reality this change might not save all the "time and energy" that it has been purported to do.

Recent press accounts have spokespersons for the Administration saying that larger employers are rejecting the proposed changes as not going far enough. They feel that too many smaller businesses are "getting off the hook" under the new regulations. We find this objection to the proposed regulations astonishing given the devastating impact they will have upon the higher education industry. In the university community, some of the "small" federal contractors that would be "getting off the hook" had the new regulations been in effect in 1980 include Boston University, Brown University, Dartmouth College, Duke University, George Washington University, Indiana University, Ohio University, Oklahoma State University, Tufts University and Medical School, University of Alabama, University of Miami, University of Michigan, University of Southern California, University of Virginia, University of West Virginia, Washington University, and Yale University.

Almost all of these colleges and universities have been brought before courts and federal agencies in the past for discriminatory practices covered under either Title VII, Title IX, or the Executive Order. Recently, the Women's Equity Action League filed an Executive Order complaint against the Colorado School of Mines at which women accounted for a mere 5.3% of the total full-time faculty. Under the new regulations, the Colorado School of Mines, though it receives over $1 million in aggregate federal contracts, would be exempted from the written Affirmative Action Plan requirement, never having had a compliance review while covered by the Executive Order. In total, approximately 25,000 or 70% of all women faculty would now hold jobs at higher educational institutions not required to have written plans--a far cry from the figure of 80% which the Department of Labor has quoted us.

We have seen many examples of universities who receive a number of contracts which add up to over $1 million, but lack any single contract over $1 million which would require them to have written plans under the new regulations. The Carter Administration had determined, in their three year review which included extensive consultation with civil rights groups and the business community, that aggregation of contract values for written Affirmative Action Plan coverage was a much needed provision in the Executive Order regulations. The case for aggregation of contracts, we feel, is undeniably stronger given a $1 million threshold. Unfortunately, under the Reagan Administration's plan, there will be no such feature to correct for gross inequities. We are certain that no aggregation of contract values will bolster demands for federal money, since in theory, contractors would be able to hold many $999,999 contracts without being obligated to have a written affirmative action plan. Among those universities receiving over $1 million in multiple federal contracts (aggregate) and thus still not required to have written Affirmative Action Plans under the provisions of the new regulations are Yale University (receiving over $4 million), University of Michigan (receiving over $7 million), George Washington University (receiving over $3 million), and the University of Alabama (receiving over $2 million).

That such great sums of taxpayer's money would be given to institutions of higher education without a strong Affirmative Action compliance program goes against the very purpose of the Executive Order as issued by President

Johnson in 1965, and it is a significant retreat from the commitment of successive administrations to the fundamental concepts of Affirmative Action programs.

Not so very long ago, there was a hue and cry in academe from many colleges and universities that they did not receive a fair share of the government contracts--that institutions such as Harvard, Stanford and M.I.T. had undo and unfair influence on the award process and they allegedly had disproportionate share of the bounty. It would be easy for OFCCP to oversee the employment practices of only the traditional, elite institutions; and given their trackrecords in the employment of women and minorities, it would not be a wasted endeavor. But as opportunities for federal funds have become more widely distributed to a broader range of institutions, so too has the regulatory workload of the federal government expanded. Would we want to turn this around?

It is simply irresponsible, then, to allow the entire Executive Order compliance program to be undermined by widening loopholes for non-compliance under the guise of reducing regulatory burden rather than by shorring up existing deficiences. Simply because OFCCP has often failed to administer the Executive Order program well, does not mean that we should allow those whose hearts are not sympathetic to the philosophy of the program to convince us that the program is fundamentally unsound.

Colleges and universities are often viewed as the best example of merit selection at work. Faculty hiring, tenure, promotion and salary decisions are too often regarded as virtually unchallengeable because of the nature of the peer review system by which they are made. It is commonly held that only scholars are qualified to determine the worth of other scholars, and thus administrative agencies and even courts should have no role in overseeing this process.

The Executive Order program has done a great deal to demystify the academic decision-making process. Now that the heavy white mist that far too long has enshrouded the Ivy Tower is beginning to burn off--it's simply unacceptable for the Department of Labor to turn off the heat.

Ms. GROSSMAN. I would just like to point out that the proposals, and some that are not yet officially proposals, discuss many issues, one dealing with the suitability of backpay awards, also redefinition of the contractor status in terms of number of employees and contract amount that would require a written affirmative action plan.

One reason we are so concerned about it at this stage and date is that the Reagan regulatory reform process, we believe, might be completed before the fall hearings. I think we have every reason to believe that that process is moving rather quickly.

The CHAIRMAN. We are trying to slow it down because we think these hearings are important. We think there ought to be some consideration given to your testimony and the testimony of others who testify at these hearings. Ultimately we will get into those proposed regulations. You can testify with more specificity then.

Ms. GROSSMAN. I understand that.

The CHAIRMAN. We are as concerned as you are even though I may have a different perspective.

Ms. GROSSMAN. I understand that. I understand that you may be negotiating as much as you can with the White House, but we also have to recognize that this committee has no official oversight over the Executive order program per se. It is an executive branch program.

The CHAIRMAN. We may differ with you on that. As a matter of fact, I think they will show up when we call them to show up.

Ms. GROSSMAN. Good luck.

The CHAIRMAN. Do not wish us luck. They will be here. Wish them luck.

Ms. GROSSMAN. Anyway, we think that one thing the committee could do in considering the fall hearings is be very attentive to the scheduling of proposed regulations as they do come out in the Federal Register, probably in late August. You might want to use hearings as a part of the public comment period on these proposed changes. They would have to be very timely in their scheduling. We of course would be glad to discuss them in greater detail at that time.

We have copies of our complete statement for the record and for individuals who would be interested in having that.

The CHAIRMAN. Without objection, those will be placed in the record following your oral presentation.

In my opening remarks yesterday, I pointed out that the purpose of these hearings was to improve OFCCP's capacity to carry out its mission. You and I can at least agree on that.

The complaints primarily have been the failure to carry out its mission, the overregulatory and burdensome practices, the lack of knowledge about the various businesses and how they operate, the officiousness that they have used, et cetera.

In that regard, let me just read part of a letter into the record. It was written to us and we will probably call this person as a witness later. This is a letter from an OFCCP supervisor.

> DEAR SENATOR HATCH: I am currently employed as a supervisory equal opportunity specialist—employment in the (blank) area office of the Office of Federal Contract Compliance Programs. I probably have as much or more direct field level experience in equal employment opportunity as anyone in current Federal agencies.
>
> For the past several years, I have been engaged in a running battle with management of these agencies regarding numerous problems I have seen: One, layer upon layer of unnecessary levels of review; two, paperwork burdens; three, Government "highhandedness"; four, lack of commonsense and reliance upon form over substance; five, wasteful operation; six, generally poor management techniques and mismanagement of resources.

Would you disagree basically with this OFCCP supervisor?

Ms. GROSSMAN. I would not disagree that there are instances of all of those within the compliance program. I think the relative frequency and weight are important to consider.

The CHAIRMAN. Thank you. We appreciate your coming and testifying today. We look forward to your future testimony before the committee as well. We appreciate your viewpoint.

[Material supplied for the record follows:]

Barbara M. Pearson, Director
Equal Opportunity,
Affirmative Action

1880
1980

TELEPHONE: (213) 743-8710
ADMINISTRATION, ROOM 304

SEP 14 1981

August 17, 1981

Senator Orrin G. Hatch
Russell Office Building
Room 411
Washington D. C. 20510

Subject: Hearings on Executive Order 11246

Dear Senator Hatch,

The University of Southern California has three continuing contracts that are over one million dollars each. In addition, USC has cumulative contracts of over 30-million dollars, and grants of over 51-million dollars.

Thus the testimony before the Senate given by WEAL (Women's Equity Action League) that the University would be exempt from a written affirmative action plan if the trigger ceiling was raised to one million dollars is simply not true.

The tremendous pressure put on USC by federal compliance agencies has cost thousands of dollars that should have been directed toward educational needs. The thousands of pages of data required by the Office for Civil Rights and the Department of Labor have never been analyzed by either agency.

If universities are to be allowed to perform their missions of research and education, some reforms in the current burdensome regulations are needed.

Sincerely,

Barbara M. Pearson

Barbara M. Pearson
BMP:md

The **CHAIRMAN**. Our next witness will be Estelle A. Fishbein, general counsel of Johns Hopkins University in Baltimore, Md.

Ms. Fishbein, we are very happy to have you here. We look forward to taking your testimony.

STATEMENT OF ESTELLE A. FISHBEIN, GENERAL COUNSEL, JOHNS HOPKINS UNIVERSITY, BALTIMORE, MD.

Ms. **FISHBEIN**. Mr. Chairman, in addition to being general counsel of Johns Hopkins University, I am also the immediate past president of the National Association of College and University Attorneys. I have worked as legal counsel for universities for a period of almost 13 years.

The purpose of my appearance today is to urge that this committee give its attention to the policies and practices of the Office of Federal Contract Compliance Programs, an agency whose enforcement of Executive Order 11246 has, in my experience, been extraordinarily onerous and wasteful in its burdens on colleges and universities.

At the outset, I also would like to stress that my criticism of the present enforcement efforts of OFCCP should not be viewed as advocating a retreat from the goals of equal employment opportunity to which this Nation's colleges and universities remain firmly committed. Our quarrel with OFCCP is over practices and procedure.

Nevertheless, the experience of colleges and universities under OFCCP's enforcement of the Executive order indicate that the agency has brought only confusion, inefficiency, and gross wastefulness to the Federal civil rights enforcement effort.

It can truthfully be said that since it assumed responsibility in 1978 for reviewing the compliance of universities with the Executive Order, OFCCP has generated nothing but adverse criticism from university attorneys and officers.

Mr. Chairman, I have appeared earlier this year before the Subcommittee on Federal Expenditures, Research, and Rules of the Senate Committee on Government Affairs to give a graphic demonstration of the paperwork burden on one university created by OFCCP regulations and the peculiar methods of their personnel. At that time, I brought with me an accumulation of the documents relating to the 2-year OFCCP preaward compliance review which is still in progress at Johns Hopkins University. I have brought these documents back today. They are in that case over there.

The **CHAIRMAN**. This case is about 4-feet high.

Ms. **FISHBEIN**. They are the best way I can think of to illustrate the wastefulness and inefficiency of the OFCCP enforcement effort. These documents weigh at least 65 pounds. They form a stack 2½-feet high. Of course, we were required to produce a duplicate set for OFCCP's own files. It is clear that the current regulations cause an enormous paperwork burden both on the university and the Government.

It should be borne in mind that Johns Hopkins University is a relatively small institution. We have less than 6,500 employees. In effect, 2 pounds of paper have been generated for every 100 employees, 1 pound for us and 1 pound for them. Larger universities with a full complement of graduate schools of course have a significantly larger volume of paperwork to produce.

What has become clear, too, is that regulations which require the production of this much paper are bound to frustrate any real effort to monitor affirmative action.

The **Chairman**. Are there two sets there, or is that just one set?

Ms. **Fishbein**. That is just one set.

The **Chairman**. It sure looks higher than 2½ feet to me.

Ms. **Fishbein**. It may well be. It keeps on growing.

The **Chairman**. Maybe you will have 10 feet next year.

Ms. **Fishbein**. I think that is a definite possibility.

The manufacture of that kind of a paper blizzard, I think, is the best guarantee that Federal agency personnel will always be inadequate to their task of enforcement and will not be able to deal effectively with a review or to evaluate the information submitted to them.

The paperwork burden imposed by OFCCP on universities and colleges is really only one of higher education's difficulties with that agency. As required by the regulations, a college or university is required to generate information consisting of extensive numerical analyses of the racial, sexual, and ethnic origin composition of its work force, the theoretical availability of employees for each category of job, the utilization of women and minorities, and the establishment of so-called goals and timetables to achieve the presence of minorities and women in the work force in exact comparability to their presumed presence in the labor market.

OFCCP's first review of Johns Hopkins lasted 9 months. In December 1978, the university was informed that its progress was acceptable. However, a passing grade from OFCCP, we found, is really a tenuous thing. Only 5 months after we received OFCCP's seal of approval, that agency announced its intention of performing another preaward compliance review. This would be the eighth time in 4 years that our university would be reviewed for compliance with the EEO laws.

Remarkably, OFCCP demanded that the university produce updated documentation and statistical analysis by a date which was 2 days previous to the time we received the letter. Despite the patent irrationality of such a demand for instantaneous production of extensive statistical information, the university was in fact able to secure only a 2-week extension.

In order to meet that deadline, university personnel—this is the Purdue experience again—were required to interrupt other work of high priority, they had to work overtime, and they had to reorder their work and vacation schedules. However, the university met its commitment on time.

However, then OFCCP abandoned and did not complete the review, a failure it attributed to changes in personnel and excessive workload. After 10 months of silence, they announced to the university their intention to resume the compliance review and demanded additional and updated information.

What was interesting about this new demand was that it included a request that the university submit a work force summary by EEO-1 job categories in addition to a work force summary by the EEO-6 job categories, even though the EEO-1 format had been obsolete for university use since 1974 because its job categories were not apt for institutions of higher education.

Finally, after the passage of another 6 months, Johns Hopkins was informed of OFCCP's findings that it was not in compliance with applicable law, and it was given a lengthy list of alleged deficiencies, none of which relate to any proven act of discrimination by the university. Moreover, upon analysis, many of the deficiencies charged to Johns Hopkins were actually attributable to the agency's own failure to read, review, and comprehend the massive documents which they had demanded and which we had given them.

In some instances, the deficiencies charged to us were the result of the university following instructions which OFCCP itself had given during its previous compliance review but which no longer suited their personnel.

In terms of pure affirmative action implications, OFCCP's 2-year effort has brought only a trivial revision of the university's goals for the employment of female faculty. That goal has now been increased from four to six women who are to be hired within the next 3 to 6 years in order to achieve the exact comparability that OFCCP demands.

The CHAIRMAN. That is a one-third increase, I guess, if you went to statistics like they do.

Ms. FISHBEIN. I cannot quarrel with that.

This simple statement summarizes OFCCP's contribution to affirmative action and equal employment opportunity after the expenditure of many tens of thousands of dollars of taxpayer money, and certainly the expenditure of something probably close to $125,000 of university money. Thus far this story has no happy ending because the compliance review of the Johns Hopkins University is continuing. It is now into its third year.

The primary difficulty, in my view, with OFCCP's current approach to monitoring the equal employment efforts of Government contractors is that of the agency's reliance on the illusory concept of availability and underutilization. Underutilization is defined in the regulations as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. However, OFCCP has applied this to mean that underutilization exists whenever there is any numerical disparity between the availability of minorities and women for a job group and the number of such persons employed in the job group.

While it is difficult enough to judge availability in the industrial setting, it is near to impossible in the academic world, and the preparation of the statistics required by the regulations is nothing more than a meaningless exercise.

There is in the first place a paucity of data on the minority and female representation in the many academic disciplines and subspecialties within each of the disciplines. In many subspecialties, the availability of minorities is virtually nonexistent.

Moreover, availability is a fiction which ignores the realities of life in a free society and the unique needs of academic institutions. It assumes that every qualified person is perpetually seeking a job, disregarding the fact that at any given time many employees do not wish to change employers. This is particularly true in academic employment where tenure and the prestige of a particular institution are factors which tend to increase longevity in employment.

Then, too, OFCCP prefers to pretend that everybody earning a college degree from a bachelor degree to a doctorate is somehow available to teach and do research in a college or university. We have had trouble convincing them that a Ph. D. is an appropriate requirement for faculty employment at Johns Hopkins.

Another common error is that the OFCCP personnel do not appreciate that there is a high degree of specialization within each academic discipline, and that for valid educational reasons, an academic department must have a variety of expertise represented within its faculty.

The CHAIRMAN. It sounds like it is going to be pretty hard to run a university, or maybe not run it but teach in a university.

Ms. FISHBEIN. It would be hard to run a first-class university.

Moreover, the agency ignores the reality that not every person who secures a doctorate desires employment in a college or university. As a matter of fact, in a highly developed and industrialized society like ours, the holder of a doctorate, for example, in the sciences is likely to have ample employment opportunities in industry which offer higher potential lifetime earnings than can be attained in an academic career.

Neither the regulations nor the agency personnel acknowledge the natural reluctance of people to abandon ties of family and friends to accept employment at what might be a remote location.

In truth, there are not and never can be acccurate availability statistics in a free society. The assumptions which OFCCP has attached to availability statistics are warranted only in a totalitarian state where Government can assign people to work where the Government decides they should work.

However, no discussion of that agency's performance in the enforcement of the executive order would be complete without mention of what I can only describe as the comic opera quality which prevades a compliance review by that agency.

Typically, the cast of characters keeps changing in the course of a review, which perhaps is not surprising since it is normal for a review of a college or university to last a year or more. Compliance reviews are conducted by teams. Each successive contact with an OFCCP audit team is marked by the appearance of new faces.

Accordingly, we find that there is little sense of continuity since new investigators necessarily lack an appreciation of what has gone before and we always have to educate them. In fact, we always seem to have to start with describing to them the difference between a tenure system of employment and regular employment. Consequently, we are always subjected to repetitious demands for documents, and prior understandings and commitments with previous agency personnel are disavowed out of hand.

Our experience has been that OFCCP has a remarkable propensity for losing and misplacing documents and information furnished it in response to agency demands. In the course of a current compliance review, we have had to furnish certain documents two, three, six, and even nine times. OFCCP appears to be oblivious to the financial burden this wastefulness imposes on a college.

Compliance reviews, frankly, are likely to be a bit surrealistic. For example, the Johns Hopkins University was told that its affirmative action plan was deficient because it failed to describe our efforts to publicize the university's EEO policy despite the fact that we had supplied OFCCP with all of the documents such as posters, notices, and media advertisements which had actually been used by the university. These posters and notices had been supplied to OFCCP nine times.

The CHAIRMAN. Nine times?

Ms. FISHBEIN. Nine times.

The CHAIRMAN. In your opinion, did those posters and notices meet the compliance standards of OFCCP?

Ms. FISHBEIN. Absolutely. The problem was that OFCCP refused to accept these posters and notices as evidence of the university's effort to disseminate its policy. They insist instead that we prepare a narrative statement quoting these very same documents.

The CHAIRMAN. They refuse to accept the actual material?

Ms. FISHBEIN. That is right, which is the best evidence that this had occurred. They insist that we recite these in a narrative statement of some sort. We have been quibbling about this now for months and months and months.

Perhaps one of the most exasperating aspects of a compliance review is the reluctance, in fact even the refusal, of agency personnel to commit their demands to writing. OFCCP personnel are prone to making oral demands that we do this or that, such as making extensive and costly modifications of computer programs for employment information without contemporary or subsequent written confirmation.

The intimidating power of those personnel who literally hold in their hands the power to delay or interrupt the flow of Federal contract money to an institution should not be underestimated.

Senator, on July 14, OFCCP published an advance notice of proposed rulemaking soliciting public comment on the numerical approach that has been used since 1970 in evaluating the affirmative action programs of Government contractors. Hopefully, the agency will seriously entertain reasonable and feasible alternatives to the present regulation.

Unfortunately, the notice appears to me to anticipate a continuation of the numerical and mechanistic approach to evaluating an employer's equal employment opportunity program. The experience of the last decade, I would suggest, has shown that this approach is not a feasible one, that it is wasteful of the resources of both Government and the higher educational establishment, that it often yields a distorted view of an employer's equal employment effort, that it frequently disrupts normal educational activities, and particularly that it lends itself to arbitrary and capricious enforcement.

I think it is time that OFCCP stop its obsession with numerical trivia of statistical insignificance and, instead, focus compliance reviews on an institution's hiring practices, its efforts to increase the availability of employment opportunity, and its efforts to educate all levels of the work force as to equal employment obligations.

Also, I think that it is an appropriate area of inquiry for OFCCP to inquire into the university's efforts to increase racial and religious harmony in the workplace.

I know that this Nation's universities and colleges would welcome a change in OFCCP's adversarial posture and that we would prefer to be partners rather than antagonists in the quest for a society free of prejudice.

Thank you.

[The prepared statement of Ms. Fishbein follows:]

STATEMENT OF ESTELLE A. FISHBEIN
TO THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
30 JULY 1981

Mr. Chairman and members of the Committee, I am Estelle A. Fishbein, General Counsel of The Johns Hopkins University. I have recently completed service as president of the National Association of College and University Attorneys.

The purpose of my appearance before you today is to invite the attention of this Committee to a needed area of regulatory reform. The extensive experience of universities with the regulations promulgated by the Office of Federal Contract Compliance Programs (OFCCP) has shown them to be extraordinarily onerous and wasteful, devoid of logic, and capriciously enforced.

The affirmative action obligations of an institution of higher education arise as a result of its contracts or sub-contracts with the federal, state or local government. Executive Order 11246 requires every federal nonconstruction contractor and sub-contractor with 50 or more employees and doing more than $50,000 in annual business with the federal government to have a written, formal and result oriented affirmative action plan for minorities and women. That plan must comport with the OFCCP regulations, namely Revised Order No. 4 (41 C.F.R. Part 60-2) and Revised Order No. 14 (41 C.F.R. Part 60-60). The OFCCP regulations reflect a purely mechanistic approach to determining whether an employer has been discriminating against minorities and women.

I have appeared earlier this year before the Subcommittee on Federal Expenditures, Research and Rules of the Senate Committee on Government Affairs to give a graphic demonstration of the paperwork burden on one university created by the OFCCP regulations and the peculiar methods of OFCCP personnel. At that time I brought with me an accumulation of the documents relating to the two year OFCCP pre-award compliance review in progress at Johns Hopkins University. I have brought these documents back today because they are the best way I can think of to illustrate the wastefulness and inefficiency of the OFCCP enforcement effort. These documents weigh 65 pounds and they form a stack two and one-half feet high. Of course, the University was required to produce a duplicate set for OFCCP's own files so it is clear that the current regulations cause an enormous paperwork burden both on the University and the government. It should be borne in mind that The Johns Hopkins University is a relatively small university with less than 6,500 employees so in effect two pounds of paper have been generated for every 100 employees. Larger universities with a full complement of graduate schools have a significantly larger volume of paperwork to produce. The paperwork burden is also an enormous financial burden to this nation's institutions of higher education which should no longer be tolerated.

What has been clear, too, is that regulations which require the production of this much paper are bound to frustrate any real effort to monitor affirmative action. The manufacture of a paper blizzard is the best guarantee that Federal agency personnel will always be inadequate to their task of enforcement and will not be able to effectively review and evaluate the information submitted to them.

But the paperwork burden imposed by OFCCP on universities and colleges is only one of higher education's difficulties with OFCCP. The experience of my own university is, unfortunately, rather typical. No fewer than four Federal agencies have conducted eight reviews of Johns Hopkins within the past four years to determine the University's compliance with the laws prohibiting discrimination. The University first submitted information to OFCCP relating to its affirmative action plan in March 1978, soon after OFCCP assumed responsibility for reviewing the compliance of universities with the equal opportunity laws and Executive Order 11246. As required by the regulations, the information consisted of extensive numerical analyses of the racial, sexual and ethnic origin composition of the University's workforce, the theoretical availability of employees for each category of job, the utilization of women and minorities, and the establishment of "goals" and "timetables" to achieve the presence of minorities and women in the workforce in exact comparability to their presumed presence in the labor market. OFCCP's first review of The Johns Hopkins University lasted nine months and in December 1978 the University was informed that its progress was acceptable. But a passing grade from OFCCP is a tenuous thing. OFCCP's letter conveying the news of a finding of compliance was couched in menacing and punitive language and warned that additional special reports could be requested of the University at any time and that the University could be subjected to further reviews during the next twelve months if it was to be considered for the award of additional federal contracts. Even where OFCCP can find no wrong, it maintains an adversarial posture towards employers.

And, in fact, only five months after the University's receipt of OFCCP's seal of approval, that agency announced its intention of performing another pre-award compliance review. Remarkably OFCCP demanded that the University produce updated documentation and statistical analyses by the very date of its letter, May 23, 1979, although the letter itself did not reach the University until May 25, 1979! Despite the patent irrationality of such a demand for instantaneous production of extensive statistical information, the University was able to secure only a two week extension. In order to meet that deadline, University personnel were required to interrupt other work of high priority, to work overtime, and to re-order their work and vacation schedules. The University met its commitment on time but, despite OFCCP's rush to obtain all this information, the agency abandoned and did not complete the review, a failure it attributed to "changes in personnel and excessive workload". It is no wonder that OFCCP cannot do its job and claims excessive workload when a review of a comparatively small university requires agency personnel to work with 65 pounds of paper.

Ten months later, on April 24, 1980, OFCCP announced to the University its intention to resume the compliance review and demanded additional and updated information. Interestingly, OFCCP's new demand included a request that the University submit a workforce summary by EEO-1 job categories in addition to a workforce summary by EEO-6 job categories, even though the EEO-1 format has been obsolete for university use since 1974 because its job categories are inapt for institutions of higher education.

Finally, after the passage of another six months, the University was informed of OFCCP's findings that it was not in compliance with applicable law and was given a lengthy list of alleged deficiencies. That list of deficiencies is most instructive. What is most interesting about the so-called "deficiencies" is that none relate to any proven act of discrimination by the University. In short, an employer can be held to be in noncompliance with Executive Order 11246 and lose the right to be awarded government contracts despite scrupulous observance of the laws prohibiting discrimination, merely because its paperwork does not satisfy OFCCP's voracious and capricious appetite.

Moreover, it was immediately obvious that many of the cited "deficiencies" were attributable to OFCCP's own failure to read, review and comprehend the mass of material demanded by and given them. In some instances the "deficiencies" were the result of the University observance of instructions which OFCCP itself had given during its previous compliance review but which no longer suited agency personnel.

In terms of pure affirmative action implications, OFCCP's two year effort has brought only a trivial revision of the University's goals for the employment of female faculty. That goal has been increased from four to six women who are to be hired within the next three to six years. This simple statement summarizes OFCCP's achievement after the expenditure of many tens of thousands of dollars of taxpayer money. We submit that this is insufficient justification for the financial burden imposed on the University by reason of the regulations and resulting compliance review.

Thus far this story has no happy ending and the compliance review of The Johns Hopkins University is now into its third year.

The primary difficulty with OFCCP's current approach to monitoring the equal employment efforts of government contractors is that of the agency's reliance on the illusory concepts of "availability" and "underutilization". The OFCCP regulations require an employer to prepare an extensive, detailed numerical analyses of its workforce. The declared purpose of the preparation of the numerical analyses is to permit a determination as to whether, and in which jobs, minorities and women are "underutilized". Underutilization is defined in 42 C.F.R. 60-2.11(b) as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability." However, so called Technical Guidance Memo No. 1 (TGM No. 1) purports to further define the Regulation's use of the word "underutilization" by stating that "underutilization exists whenever there is a numerical disparity between the availability of minorities or women for a job group and the number of such persons employed in the job group." (The United States District Court for the Eastern District of Texas has recently struck down the rigid interpretation of "underutilization" in TGM No. 1, holding that it is unreasonable, inconsistent with the regulation it interprets and with past agency practice, and that it was promulgated in violation of the Administrative Procedure Act. Firestone Synthetic Rubber & Latex Co. v. Marshall, 49 U.S.L.W. 2535 (Feb. 24, 1981).)

While it is difficult enough to judge "availability" in the industrial setting, it is near to impossible in the academic world and the preparation of these statistics is nothing more than a meaningless exercise. There is, first, a paucity of data on the minority and female representation in the many academic disciplines and sub-specialties within each of the disciplines. In many sub-specialties the availability of minorities is virtually nonexistent. Accordingly, page after page of the required availability and utilization analyses which universities are required to produce carry lines of zeroes indicating the non-availability of minorities and women for academic job groups.

Moreover, "availability" is a fiction which ignores the realities of life in a free society, the marketplace, and the unique needs of academic institutions. It assumes that every "qualified" person is perpetually seeking a job, disregarding the fact that many employees do not wish to change employers. This is particularly true in academic employment where tenure and the prestige enjoyed by a particular institution are factors which tend to increase longevity in employment. Then, too, OFCCP prefers to pretend that everyone earning a college degree, from a bachelor degree to a doctorate, is "available" to teach and do research in a college or university. Frequently OFCCP personnel will not concede that in many academic institutions a Ph.D. is an appropriate requirement for faculty employment. Another common error is that OFCCP personnel appear to feel that, for example, every holder of a doctorate in chemistry can teach every chemistry course, ignoring the fact that there is a high degree of specialization within each academic discipline and that for valid educational reasons an academic department must have a variety of expertise represented within its faculty.

Moreover, OFCCP ignores the reality that not every person who secures a doctorate desires employment in a college or university. In fact, in a highly developed and industrialized society the holder of a doctorate in the sciences is likely to have ample employment opportunities in industry which offer higher potential life time earnings than can be attained in an academic career. Then, too, the regulations do not recognize that colleges and universities in rural areas are at a significant recruiting disadvantage and cannot attract women and minorities as easily as urban academic institutions. Neither the regulations nor OFCCP personnel acknowledge the natural reluctance of people to abandon ties of family and friends to accept employment at a remote location. In truth, there are not and never can be accurate "availability" statistics in a free society. The assumptions which OFCCP has attached to "availability" statistics are warranted only in a totalitarian state where government can assign people to work where the government decides they should work.

No discussion of OFCCP's performance in the enforcement of Executive Order 11246 would be complete without mention of the comic opera quality which pervades a compliance review by that agency. Typically the cast of characters keeps changing in the course of a review which perhaps is not surprising since it is normal for a review of a university or a college to last a year or more. Compliance reviews are conducted by teams of bureaucrats and each successive contact with an OFCCP audit team is marked by the appearance of new faces and the departure of former members. Accordingly, there is little sense of continuity since new investigators necessarily lack an appreciation of what has gone before. Consequently repetitious demands for documents and information are inevitably made and prior understandings and commitments are disavowed.

Then, too, OFCCP has a remarkable propensity for losing and misplacing documents and information furnished it in response to agency demands. In the course of a current compliance review, Johns Hopkins has furnished certain documents two, three, six and even nine times.

Compliance reviews are likely to be a bit surrealistic. For example, my University was told its affirmative action plan was deficient because it failed to describe internal and external dissemination of EEO policy, despite the fact that the plan incorporated all of the documents such as posters and notices actually used by the University. These posters and notices had been supplied to OFCCP nine times. OFCCP has refused to accept these posters and notices as evidence of the University's efforts to disseminate its EEO policy and insists, instead, on a narrative statement quoting these very same documents!

Perhaps one of the most exasperating aspects of a compliance review is the reluctance, even refusal, of agency personnel to commit their demands to writing. OFCCP personnel are prone to making oral demands that a university take certain actions, such as making extensive and costly modifications of computer programs for employment information, without contemporary or subsequent written confirmation. The intimidating power of OFCCP field personnel who literally hold in their hands the power to delay or interrupt the flow of federal contract money -- to an institution, should not be underestimated. However, no citizen or organization need be required to rely on government by telephone.

It is against this background of byzantine bureaucracy that, on July 14, 1981, OFCCP published an advance notice of proposed rulemaking soliciting public comment on the numerical approach used since 1970 in evaluating the affirmative action programs of government contractors. Hopefully, OFCCP will seriously entertain reasonable and feasible alternatives to the present regulations. Unfortunately, however, the notice appears to anticipate a continuation of the mechanistic approach to evaluating an employer's equal employment opportunity program. The experience of the last decade, however, has shown that this approach is wasteful of the resources of both government and the higher education establishment, that it often yields a distorted view of an employer's equal employment efforts, that it frequently is disruptive of normal educational activities, and that it lends itself to arbitrary and capricious enforcement.

It is time for OFCCP to stop its obsession with numerical trivia and, instead, to focus compliance reviews on an institution's hiring practices, its efforts to increase the availability of employment opportunities, its efforts to educate all levels of the workforce as to equal employment obligations, and its efforts to increase reacial and religious harmony in the work place.

I know that this nation's universities and colleges would welcome a change in OFCCP's adversarial posture. They would prefer to be partners rather than antagonists in the quest for a society free of prejudice.

The CHAIRMAN. Thank you.

I would like to come down for a minute to take a look at these documents and have you explain to me what these are.

Ms. FISHBEIN. These binders represent information, some of it in narrative form and some of it in chart form, indicating the information we have submitted to OFCCP describing our affirmative action plans.

The CHAIRMAN. Are each of these binders with similar statistical information?

Ms. FISHBEIN. That is right. Well, they are all different kinds of information. These represent computer printouts which are analyses of our workforce and which indicate the job categories and the numbers of minorities.

The CHAIRMAN. Is there confidential information in your printouts?

Ms. FISHBEIN. No.

The CHAIRMAN. One individual who testified, testified that they asked for all their confidential personnel files.

Ms. FISHBEIN. They have asked for that. I have not brought those with me.

The CHAIRMAN. Did you give those to them, too?

Ms. FISHBEIN. This is the way we handled a review which they went into after they were not able to find that we had truly discriminated against anybody. They decided to review actual personnel files.

Our personnel files contain a lot of information which is really irrelevant to any inquiry about discriminatory conduct. The way we finally agreed to conduct that review with them was to have our affirmative action officer sit and take each personnel file and read out to the OFCCP people the date of employment of that individual, the sex of that individual, and their rate of salary.

The CHAIRMAN. You had to have actual personnel sit there and just read the information to them?

Ms. **Fishbein**. Yes.

The **Chairman**. Did you have difficulty getting them to accept that process?

Ms. **Fishbein**. Yes. We have always had difficulty with Federal agencies in that area. You have to understand that it is important to us. We feel a commitment to protect the privacy of our employees. Those files contain confidential health information that many people would not want disseminated.

The **Chairman**. Did they finally accede to your approach?

Ms. **Fishbein**. They finally did, yes.

The **Chairman**. Ms. Fishbein, the reason we called on you is you are probably the most respected university attorney in the country. There are others who are very good also, perhaps equally as good, but you just completed, as you mentioned, your service as president of the National Association of College and University Attorneys. We respect your viewpoint here.

I take it you disagree with Ms. Grossman from the Women's Equity Action League who testified just before you as far as how burdensome the OFCCP's approaches really are.

Ms. **Fishbein**. Senator, I would like to say something in response to Ms. Grossman's testimony. I am a woman and I am a lawyer. I began practicing my profession in the city of Baltimore almost 25 years ago when a woman attorney was an oddity in that city. I am no daughter of privilege. I am a first generation American. Yet I have had the high honor of representing the United States, the State of Maryland, and two great universities in the course of my career. I think that I know the meaning and the significance of equal opportunity to the people of this country.

I am confident of my ability to judge that the artificialities and the contrived mechanisms of the OFCCP regulations have not accelerated progress toward a more just society or contributed in any meaningful way to equal employment opportunity in our colleges and universities. If anything, they have seriously diverted higher education's energy and limited resources away from the real job to justifying the existence of yet another bureaucratic enterprise.

This is not to say that there is no role for OFCCP. I expect to submit as comments to the invitation for comments published in the Federal Register a suggestion for a way to reorder that agency and its mission. It would be to abandon completely the numerical analysis and to substitute something else instead.

The **Chairman**. We will be very interested in your suggestions. I take it that you feel that this statistical effects test type approach is not the appropriate approach?

Ms. **Fishbein**. Yes. I will say to you Johns Hopkins is very fortunate to have had as its Affirmative Action Officer for many, many years a very talented black woman, who constantly complains to me and is absolutely frustrated beyond belief that she must spend 90 percent of her time generating that kind of material and has very little time to spend working with people. Affirmative action should be working with people and not working with paper.

The **Chairman**. Finding jobs for people and finding minorities, women, and handicapped people who can take these jobs.

Ms. **Fishbein**. That is right.

The **Chairman**. One of the complaints I have had is that we have gotten so lost in the statistical approach, in the effects test approach rather than the intent of what goes on that we are failing to do the job that really needs to be done.

Ms. **Fishbein**. I am in total agreement with that, Senator.

The **Chairman**. Why does OFCCP refuse to bring their investigations to a close, at least in your estimation or opinion?

Ms. **Fishbein**. As a former Federal employee—as a matter of fact, I worked for HEW for 10 years as my first job out of law school—and from my observation of the way OFCCP operates, I think that the field personnel feel that going out to a university is really something akin to a lark.

I mean we have had teams of four investigators at a time come on campus. They need four investigators because one of them may spend his time reading "Esquire," believe it or not. According to what we hear from the secretaries who are in the outer offices, another may spend his time making personal telephone calls. The business of the Government should be conducted during work hours even if the personnel are off the premises of a Government office building. This is simply not the case.

I think there is an inability to comprehend what is a complex operation. I agree with the president of Purdue University. Running a university is complex. It is different from a normal for-profit industry. Either they are not given adequate training and instruction, or perhaps there is just an inability or unwillingness to understand that we are different, which leads to their consequent inability to make decisions.

The **Chairman**. Do you feel that there is an attitude of presumption of guilt on the part of the universities by OFCCP personnel?

Ms. **Fishbein**. There is absolutely a presumption of guilt. The attitude is that you are guilty until you are proven innocent. There is a reluctance to admit to a finding of nondiscrimination.

The **Chairman**. I noticed yesterday one of our reporters wrote and seemed to dwell only on the *Prudential* case. If I did not misconstrue what was written, it was written fairly sarcastically. You know, it is a big corporation and everybody hates big corporations. I suppose Dow is going to testify next and there is probably no corporation hated more by certain segments of our society than Dow. Therefore, anything they say naturally cannot be true.

However, what interests me is that we have a lot of advocates for women's rights, for minority rights—we have not had anybody particularly speaking for handicapped rights at this point—who really want the system to work and who are very, very upset, like yourself, at what a lousy system it really is as presently constituted.

That is among the most frustrating things that I am finding. I take it that you feel much more frustrated than I because you have to deal with this on a daily basis.

Ms. **Fishbein**. Sitting across the table from them is really an exercise in frustration and requires a great deal of self-control.

The **Chairman**. I personally admire you. I admire your testimony here today. It is not just because we agree. It is because you backed it up. You are a pro. You are an expert talking about things that you know as well as anybody in this country. You have been recognized throughout the country as one of the top leaders in this field.

Where maybe as to business people, certain segments of our society can say they do not believe them because they are business people, I happen to believe that business people in this country are pretty honest and decent people. I think there is an increasing attitude that maybe we better start giving business people a little more credit for what is going on.

Even if we do not, they have to listen to testimony like you are giving here today. If they will treat universities—which almost everybody, carte blanche, respects—this way, then what are they doing to business people? Even if you do not like big business people, if they can do it to them, what are they doing to the little business people? Really what is the final result in America?

If through doing all of this dirty stuff to these people—at least some of the testimony is indicating that—they are doing injustice, and are they not doing injustice to the real rights of minorities and others in our society?

I notice that you said that after all of this compliance review, it resulted in a decision to raise the level of women from four to six. I was sarcastic in indicating that it was a third raise. It depends on which figure you are looking at. It is a 50-percent increase in women if you want to use statistics, but really it is a relative small gain for women after all of this paperwork and compliance review, would you not say?

Ms. FISHBEIN. I would say that. Besides which, Senator, I think that if we had been able to devote the amount of money which was spent during our compliance review to our budget for faculty salaries, we could maybe hire more women and minorities.

The CHAIRMAN. You could have hired five or six women, could you not?

Ms. FISHBEIN. That is right. We certainly could.

The CHAIRMAN. If you had been able to have your personnel people spend their time in looking for jobs that would open up, looking for qualified women and minorities to fill those jobs, you might even have been able to hire a lot more than that.

Ms. FISHBEIN. That is probably true, yes.

The CHAIRMAN. Thank you.

We appreciate your testimony and the efforts you put forth.

Our next witnesses will be Mr. Frank Hammond, director of personnel relations of the Dow Chemical Corp. in Midland, Mich., and Mr. Patrick H. Estes, III, manager of the EEO programs in Midland, Mich.

I did not mean to prejudge your appearance here, gentlemen, but I know you are certainly used to abuse. You have certainly taken it for many years from the Federal Government.

We are interested in your testimony. We think it is important for big and small business to be represented in these areas as well as people who have views that are different from your own. We are going to try to keep this broad base. We have had some testimony against these programs.

We will turn the time over to you.

STATEMENT OF FRANK HAMMOND, DIRECTOR OF PERSONNEL RELATIONS, DOW CHEMICAL, U.S.A., MIDLAND, MICH., ACCOMPANIED BY PATRICK H. ESTES III, MANAGER, EEO PROGRAMS, MIDLAND, MICH.

Mr. **Hammond**. Thank you, Mr. Chairman.

As director of personnel relations for Dow Chemical, U.S.A., part of my responsibilities incl[illegible] oversight of Dow's equal employment programs.

Let me say initially that Dow Chemical Co. strongly supports the concept of equal opportunity employment for all individuals regardless of race, color, religion, sex, or national origin. Dow believes that planning to assure such equal opportunity is an absolute necessity. No endeavor can succeed unless its efforts are planned. As Vince Lombardi once said, "If you do not care where you are going, almost any map will do."

For that reason, Dow believes that affirmative action plans are necessary. Dow has had such plans in effect in one form or another for the past 15 years. These plans, coupled with a very strong top management commitment to their success, are the key to Dow's fine record in equal employment opportunity.

We also believe our results have mostly occurred in spite of and not as a result of Government inspection and pressure. This has been particularly true during the last 3 years when the OFCCP has required Dow to make major format changes in its very successful affirmative action plans.

The resulting plans are of such incredible complexity that they become virtually worthless to us. In our view, all that has been accomplished is the production of stacks of documents for the headquarters bureaucracy of the OFCCP.

If you will allow me, Mr. Chairman, we have stacked our affirmative action plans in front of your desk.

The **Chairman**. Let me take a look at them. I cannot see them from up here.

Mr. **Hammond**. My apologies to Johns Hopkins. We are not trying to get into a contest here, but our stack measures 5 feet and weighs 158 pounds.

The **Chairman**. You clearly win the contest.

Mr. **Hammond**. I should point out also that this does not include all the computer printouts that go behind it.

The **Chairman**. How high would they stack up?

Mr. **Hammond**. I would imagine another 3 feet.

Each of these are for an individual unit of the Dow Chemical Co. across the country, which is also required by regulation.

Based on these experiences, Mr. Chairman, and our many years of successful equal opportunity efforts, Dow has two basic and rather simple recommendations for this committee.

First, the affirmative action plans must be the responsibility of the contractor. They must be developed to fit the contractor's business, the contractor's particular employee mix, and the contractor's needs. No two businesses in this country are alike. Each individual affirmative action plan must be tailored to fit the individual company. To force fit such plans into a single rigid format as the OFCCP now demands is self-defeating.

Second, the OFCCP must concentrate on monitoring the bottom-line progress of each contractor in the employment and promotion of women, minorities, and the other protected classes. This monitoring must consist of periodic reviews of currently available EEO-1 data which is submitted uniformly by contractors.

Only when that data indicates no progress should the agency intervene. When that intervention becomes necessary, it should be in the form of technical assistance for mutual problem solving. Only when that fails should the agency undertake enforcement actions.

The Dow Chemical Co. knows that women, minorities, veterans, and handicapped people represent very valuable resources which we must continue to develop and utilize. Government, acting as a partner instead of an adversary, can assure that even greater progress will be made in the coming years.

Now Mr. Patrick Estes, our manager of EEO programs will discuss our experiences and recommendations in more detail.

The **CHAIRMAN**. Mr. Estes?

Mr. **ESTES**. Dow is here today to present a brief look at affirmative action in our company over the last 15 years. We plan to emphasize the following points.

One, once Dow's internal affirmative action program was initiated, Government agency involvement, regardless of how much and when and by whom, has had little effect on Dow's rate of progress in hiring and promotion of minorities and women.

Two, OFCCP's standardized affirmative action plan format requirements has resulted in plans which are of limited usefulness in meeting DOW's goals.

Three, OFCCP compliance reviews have been time consuming and almost totally concerned with AAP format requirements rather than actual progress in the employment and advancement of minorities and women.

Four, OFCCP compliance reviews leave little room for conciliation of alleged deficiencies prior to show cause or administrative enforcement proceedings.

Finally, the management attitude of OFCCP is adversarial instead of constructive. Rigid regulations and guidelines are dictated from Washington which cannot be locally administered or tailored to individual circumstances.

Now for a little history: Dow's program to improve the utilization of women and minorities within its workforce began shortly after the passage of the Civil Rights Act of 1964 and the issuance of Executive Order 11246. This action occurred because Dow is a law abiding company and we could read the law.

This program has gone through many changes and updates in the past 15 years. Progress, nonetheless, has been constant and significant. The chart attached to the hearing testimony shows the progress in the percentage of minorities and women in the Dow workforce. The attached chart shows that the percentage of minorities increased from 1.5 percent in 1963 to 13.8 percent in 1980. The percentage of women has increased from 10.7 to 16.4 percent over this same time period.

Had our affirmative action plans not been effective and the percentage of minorities and female employees remained at their

1963 level, Dow would today have 530 minorities employed instead of our current 5,040. We would have 3,810 women compared to today's figure of 5,985. During this same period, Dow's workforce increased only 16 percent, or 4,984 employees. That figures about 1 percent per year.

It is also worth noting that since 1964, Dow's nonminority workforce increased by 411 employees while the minority workforce increased by 4,575 employees. This is strong evidence, we think, that we have had an effective program during the past 15 years.

Dow's program proceeded with relatively little Government involvement until late 1972. At that time, we underwent a series of audits by the Atomic Energy Commission. These audits produced a number of serious discussions. Over the next 3 years, Dow and the AEC, which became the Department of Energy, developed a very positive constructive working relationship. The AEC recognized that there was a commitment on our part, and AAP's were mutually redesigned with some of their assistance to help us reach our goals.

In 1975, Dow requested permission from the Department of Energy to plan and audit its own progress. Based on a recognized commitment by Dow to continue its program, the request was approved on a trial basis. This was unique to industry. This proved to be a strong stimulus to Dow's affirmative action program. It now allowed Dow the freedom to conduct its program in the context of its organization, its business, and its needs.

From 1976 through 1978, Dow conducted its own yearly audits of its EEO progress and reported the results to the Department of Energy. This self-audit process has proved so effective that Dow continues it today regardless of OFCCP audits. For example, in April and May of this year, 32 teams consisting of 71 Dow employees audited 42 Dow locations where 28,000 of our employees work.

During the self-audit years, it is important to note that progress in the utilization of minorities and women continued at the same upward rate as during previous years of close Government agency involvement.

When the Office of Federal Contract Compliance Programs was made the singular Government compliance agency in October of 1978, official Government support for Dow's self-audit posture ended.

During the years of 1979 to 1981, the OFCCP has conducted five audits of Dow facilities. These audits, summarized in detail in appendix A to your attachment, took from 4 months to 27 months to complete. Although each audit had its own unique aspects, all of them were alike in that they revolved around the OFCCP's rigid interpretation of the AAP format requirements. Our specifically tailored and previously approved affirmative action plans did not meet their standard specifications.

Consequently, Dow's first three affirmative action plan submissions in early 1979 resulted in show cause notices. Each submitted plan contained alleged major deficiencies in its workforce analysis, job group analysis, availability analysis, and goals and timetables, nothing of really bottom-line importance.

The OFCCP contract compliance manual contains very specific definitions of AAP components and how an equal opportunity specialist must audit them. Consequently, in spite of the substantial progress achieved under the Dow format, we were unable to negotiate acceptance of any variation from OFCCP's interpretation of 42 CFT 60.2 at either the OFCCP district or regional level. These negotiations over format constituted the major portion of each audit process. None of the audits produced any evidence of affected class situations or discriminatory practices by Dow.

OFCCP's inflexible internal procedures require that a show cause notice can only be rescinded by execution of a conciliation agreement. Despite the fact that the major problems concerned Dow's AAP format, we were still required to negotiate and sign conciliation agreements as if we were guilty of major discriminatory practices.

It should also be noted that the wording of the conciliation agreement was subject to very little negotiation by Dow. Specifically, the general provisions were dictated by OFCCP and changes by the district office personnel were not allowed.

The principal result of 72 months of negotiation with the OFCCP during these five audits is that stack of affirmative action plans in front of you which measures 5 feet in height and weighs 158 pounds. We carried them in here.

We have really lost the substance of the program in the shuffle of that paper. As pointed out previously, the percentage of women and minorities in the Dow workforce has continued to increase steadily since the affirmative action program was introduced in 1964. Significantly, OFCCP's pervasive involvement in Dow's employment practices over the past few years has not affected this rate of increase. It is Dow's firm opinion that its internal commitment causes this progress, not Government regulation and agencies.

Dow's affirmative action program is and will continue to be an integral part of its management planning and policies. This assures that minorities, women, handicapped, and others with the qualifications required by Dow will continue to be hired and promoted as their performance and experience dictate.

Based on our disappointing and frustrating experiences, Dow recommends that Government guidelines for affirmative action allow the development of plans to fit the needs and policies of individual companies. The format of the plan is not important and should not be a factor in audits. The emphasis must instead be on progress in the utilization of minorities, women, and other protected groups.

OFCCP should concentrate on the evaluation of the EEO-1 workforce data. This annually required employee information report summarizes the distribution of employees by specific job categories. These job categories are well established and form a good basis for an analysis of the workforce.

Using the already available EEO-1 data, the OFCCP can evaluate the progress of individual companies in the utilization of women and minorities. This data, plus a record of applicants, hire, promotions, transfers, and terminations by these same job categories provide an excellent bottom line measure of the company's EEO progress.

Where problems and deficiencies of realistic magnitude occur, the company should be given every opportunity to negotiate and correct these real problems. Only if the corrections are not done or an agreement not reached on a settlement should the administrative process be instigated.

As I hope you can tell from our testimony, Dow is committed to equal employment opportunity. The company is sincere in its belief in providing opportunities to people who have not had that opportunity in the past.

We do not object to the Government monitoring our progress. We do object to the Government telling us the process by which we must achieve that result.

It is our hope that this hearing will effect a change in the direction of the OFCCP.

Thank you.

The CHAIRMAN. Thank you, gentlemen. We appreciate having you here.

It has been said that without affirmative action plans, contractors would not be able to achieve the objectives of the Executive order. Do you agree with that statement?

Mr. HAMMOND. Yes, sir. I think our own record indicates that. I think it also goes to what you said earlier this morning, Senator. Most companies and most businesses are honest. They will do what the law prescribes. We simply need to know what is wanted, but leave us with the how to go about doing it.

The CHAIRMAN. How can a Federal contractor audit itself more effectively than a Government agency in this area? Are you saying that contractors should no longer be audited by OFCCP?

Mr. ESTES. Let us look at it statistically in how we we went about auditing ourself this year. As I pointed out, we used 71 employees in 32 teams that audited 42 of our sites. That is a 1-year audit program. For 2½ years, the OFCCP has had seven auditors visit five of our sites. By sheer time that we can put into the audit program, we can be more effective.

Some people say you cannot audit yourself. You will not be as critical. Dow employees auditing Dow employees is a critical evaluation procedure. Since our teams do not audit the sites at which they work, the competitiveness of internal audits becomes very intense.

Our employees know our system. You do not have to explain all our workforce analyses and our job groups to them. They can analyze it in much more detail than can a stranger to our system.

The CHAIRMAN. Can the objectives of the Executive order be achieved without the use of Federal Government sanctions?

Mr. HAMMOND. I believe they can, although I think we must be realistic, Senator. I think the threat of the sanctions sitting back there for those contractors who absolutely refuse to follow the law is a necessary item. However, it should be as a case of last resort. We need the Government to act as a partner with us, not as an adversary.

The CHAIRMAN. Thank you. We appreciate your coming and testifying.

[The prepared statement of Mr. Hammond follows:]

TESTIMONY OF

DOW CHEMICAL U.S.A.

EXECUTIVE SUMMARY

Thank you, (Mr. Chairman?) (Senator Hatch?). I am Frank Hammond, Director of Personnel Relations for Dow Chemical U.S.A. Part of my responsibilities include the oversight of Dow's equal employment programs.

The Dow Chemical Company strongly supports the concept of equal opportunity in employment for all individuals regardless of race, color, religion, sex or national origin. Dow believes that planning to assure such equal opportunity is an absolute necessity. No business or any other endeavor can succeed unless it plans its efforts. As Vince Lombardi once said, "If you don't care where your going, any map will do."

For that reason, Dow believes that affirmative action plans are necessary. Dow has had such plans in effect in one form or another for the past fifteen years. These plans, coupled with a strong top management commitment to their success, are the key to Dow's fine record in equal employment opportunity.

We also believe our results have mostly occurred in spite of -- not as the result of -- any government assistance, inspection or pressure.

This has been particularly true during the past three years when the OFCCP has required Dow to make major format changes in its successful affirmative action plans. The resulting plans are of such incredible complexity that they have become virtually worthless to Dow. In our view, all that has been accomplished is the production of stacks of documents, which apparently satisfy the headquarters bureaucracy at OFCCP.

Based on these experiences and our many years of successful equal opportunity efforts, Dow has two basic -- rather simple -- recommendations for this committee.

First, the affirmative action plans must be the responsibility of the contractor. They must be developed to fit the contractor's business, the contractor's particular employee mix, and the contractor's needs. No two businesses in this country are alike and, like any other business endeavor, each individual affirmative action plan must be tailored to fit the individual company. To force-fit such plans to a single, rigid format is self-defeating.

Second, the OFC -- or whatever agency is designated -- must concentrate on monitoring the "bottom-line" progress of each contractor in the employment and promotion of women, minorities, and the other protected classes.

This monitoring must consist of periodic reviews of currently available EEO-1 data which is submitted uniformly by contractors.

Only when that data indicates no progress should the agency intervene. And when that becomes necessary, the intervention should be in the form of technical assistance for mutual problem solving. Only when this fails, must the agency undertake enforcement actions.

The majority of American business now recognizes that women, minorities, veterans, and handicapped people represent very valuable resources which they must develop and utilize. Government, acting as a partner instead of an adversary, can assure that even greater progress will be made in the coming years.

Now, Mr. Patrick Estes, Dow's Manager of Equal Employment Opportunity Programs, will discuss our experiences and recommendations in more detail.

EEO TESTIMONY

WASHINGTON, D.C.

The Dow Chemical Company is here today to present a brief look at Affirmative Action within our Company. We plan to emphasize the following points:

1. Once Dow's internal Affirmative Action Program was initiated, government agency involvement, regardless of how much and when, has had little effect on Dow's rate of progress in hiring and promotion of minorities and women.

2. OFCCP's standardized Affirmative Action Plan format requirements have resulted in AAP's which are of limited usefulness in meeting the goals of our company.

3. OFCCP compliance reviews have been time consuming and almost totally concerned with AAP format requirements rather than actual progress in the employment and advancement of minorities and women.

4. OFCCP compliance reviews leave little room for conciliation of alleged deficiencies prior to "show cause" or administrative enforcement proceedings.

5. The official management attitude of OFCCP is adversarial instead of constructive. Rigid regulations and guidelines are dictated from Washington which cannot be locally administered or tailored to individual circumstances.

The Dow Chemical Company's program to improve the utilization of women and minorities within its workforce began shortly after the passage of the Civil Rights Act of 1964 and the issuance of Executive Order 11246.

Dow's Affirmative Action Program has gone through many periods of changes and updates in the last 15 years. Progress, nonetheless, has been constant and significant. The attached chart (which is Figure 1), shows the percentage of minorities in the Dow workforce has increased from 1.5 percent in 1963 to 13.8 percent in 1980. The percentage of women has increased from 10.7 percent to 16.4 percent over the same time period. Had our Affirmative Action Plans not been effective, and the percentage of minority and female employees remained at their 1963 level, Dow would have 530 minorities employed instead of our current 5,040 and 3,810 women compared to today's figure of 5,985. Dow's total workforce in the U.S. increased only 16.3% (4984 employees) during this same time period.

It's also worth noting that since 1963, Dow's white workforce increased by 411 employees while the minority workforce increased by 4575 employees. This is strong evidence that we have had an effective program during the past 15 years.

Dow's Affirmative Action Program proceeded with relatively little government involvement until late 1972. At that time, Dow underwent a series of audits by the Atomic Energy Commission. These audits produced a number of discussions and, over the next three years, Dow and the AEC (which eventually became the Energy Research & Development Agency and then the Department of Energy) developed a positive constructive working relationship. The AEC recognized that there was a commitment on Dow's part and AAP's were mutually redesigned to help Dow reach its goals.

In 1975, Dow requested permission from the Department of Energy to plan and audit its own progress. Based on a recognized commitment by Dow to continue its program, the request was approved on a trial basis. This proved to be a strong stimulus to Dow's Affirmative Action Program. It allowed Dow the freedom to conduct this program in the context of its organization, its business, and its needs.

From 1976 through 1978, Dow conducted its own yearly audits of its EEO progress, reporting results to the Department of Energy. This self-audit process proved so effective Dow continues it today, regardless of OFCCP audits. In April and May of this year (1981), 32 teams consisting of 71 Dow employees audited 42 Dow locations where 28,000 Dow employees work.

During the self-audit years, progress in the utilization of minorities and women continued at the same upward rate as during previous years of close government agency involvement.

When the Office of Federal Contract Compliance Programs was made the singular Government Compliance Agency in October 1978, official government support for Dow's self-audit posture ended.

During the years of 1979-1981 the OFCCP conducted five audits of Dow facilities. These audits, summarized in detail in Appendix A, took from 4 months to 27 months to complete. Although each audit had unique aspects, all of them were alike in that they revolved around the OFCCP's rigid interpretation of the AAP format requirements.

Dow's specially tailored and previously approved AAP did not meet OFCCP's standardized specifications. Consequently, Dow's first three Affirmative Action Plan submissions in early 1979 resulted in Show Cause notices. Each submitted plan contained alleged "major deficiencies" in its 1) Workforce Analysis, 2) Job Group Analysis, 3) Availability Analysis, and 4) Goals & Timetables ---nothing of "bottom-line" importance.

The OFCCP Contract Compliance Manual contains very specific definitions of AAP components and how an Equal Opportunity Specialist must audit them. Consequently, in spite of the substantial progress achieved under the Dow format, we were unable to negotiate acceptance of any variation from OFCCP's interpretation of 41 CFR 60.2 at either the OFCCP District or Regional Office level. These negotiations over format constituted the major portion of each audit process. None of the audits produced any evidence of Affected Class situations or discriminatory practices within Dow.

OFCCP's inflexible regulations and internal procedures require that a Show Cause notice can only be rescinded by execution of a Conciliation Agreement. Despite the fact that the major problems concerned Dow's AAP format, we were required to negotiate and sign Conciliation Agreements, as if we were guilty of major discriminatory practices.

It should also be noted that the wording of the Conciliation Agreement was subject to very little negotiation by Dow. Specifically, the general provisions were dictated by OFCCP and changes by the district office personnel were not allowed.

The principal result of 72 months of negotiation with the OFCCP during the five audits is a series of Affirmative Action Plans for Dow Chemical U.S.A. which, when stacked, measures five feet in height (Figure 2).

We've lost the substance of the program in the shuffle of paper. As pointed out previously, the percentage of women and minorities in the Dow workforce has continued to increase steadily since the Affirmative Action program was introduced in 1964. Significantly, OFCCP's pervasive involvement in Dow's employment practices over the past few years has not affected the rate of increase.

It is Dow's firm opinion that its internal commitment causes this progress, not government regulations and agencies. Dow's Affirmative Action Program is and will continue to be an integral part of its management planning and policies. This assures that minorities, women, handicapped individuals and others with the qualifications required by Dow will continue to be hired and promoted as their performance and experience dictate.

Based on our disappointing and frustrating experiences, Dow recommends that government guidelines for Affirmative Action allow the development of plans to fit the needs and policies of individual companies. The format of the plan is not important and should not be a factor in audits. The emphasis must instead be on progress in the utilization of minorities, women, and other protected groups.

OFCCP should concentrate on the evaluation of the EEO-1 workforce data. This annually required Equal Employment Opportunity Employee Information report (EEO-1) summarizes the distribution of employees by specific Job Categories. These Job Categories are well established and form a good basis for an analysis of the workforce.

Using the already available EEO-1 data, the OFCCP can evaluate the progress of individual companies in the utilization of minorities and women. This data, plus a record of applicants, hires, promotions, transfers and terminations by the same Job Categories provide an excellent "bottom line" measure of a company's EEO progress.

Where problems and deficiencies of realistic magnitude appear, the company must be given every opportunity to negotiate and correct these real problems. Only if the corrections are not done or agreement not reached on a settlement should the Administrative Process be initiated.

As you can tell from our testimony, Dow is committed to equal opportunity in employment. The company is sincere in its belief in providing opportunities to people who've not had equal opportunity in the past.

We do not object to the government monitoring our progress in Equal Employment Opportunity. We do object to the government trying to tell us the process we must use to achieve that result.

It's our hope that this hearing affects a change in the direction of the OFCCP.

We appreciate the opportunity to testify.

DOW CHEMICAL U.S.A.

% OF WOMEN & MINORITIES IN WORKFORCE

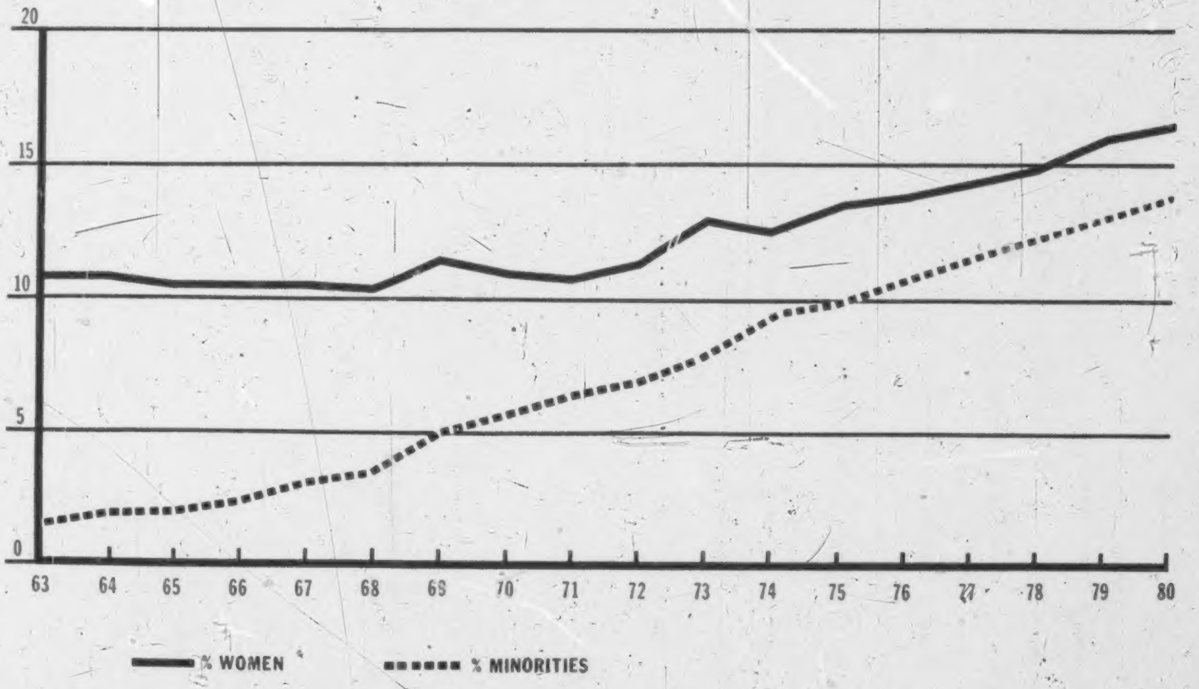

FIGURE 1

Figure 2

OFCCP AUDIT

PITTSBURG, CALIFORNIA

December, 1978 - March, 1981

In summation, this audit demonstrates:

1. OFCCP's rigid Affirmative Action Plan format requirements prevent a company from using a plan format specific to its needs and organization regardless of the past success of such a plan.
2. OFCCP issues Show Cause Notices without providing a company an opportunity to negotiate settlement of alleged "major" deficiencies.
3. OFCCP procedures must be followed to the letter by the Equal Opportunity Specialist.
   a. Show Cause Notices can only be rescinded by a Conciliation Agreement.
   b. Conciliation Agreements must contain language and terms specified by the OFCCP and not negotiable by the company.
4. OFCCP Audits are time consuming. In this case 27 months.

The reason for the Office of Federal Contract Compliance Programs' Affirmative Action audit of Dow's Pittsburg, California, location is, at best, unclear.

*December 29, 1978, Dow received notification of a compliance review from the OFCCP Oakland Area Office. Dow was given 30 days to respond to a list of 16 required desk audit information items.

*January 26, 1979, the audit information including the 1979 Affirmative Action Plan for Minorities and Women was sent to the Oakland Area Office.

*June 4, 1979, a "Show Cause" notice was sent to Dow listing 5 deficiencies in the Affirmative Action Plan, a plan in the format approved by the Department of Energy. These deficiencies involved (1) Workforce Analysis, (2) Job Groups, (3) Availability Analysis, (4) Goals and Timetables, and (5) Additional Required Ingredients. Dow was given 30 days to correct the deficiencies. The letter also stated "as a consequence of the foregoing, Dow has failed to achieve prompt and full utilization of minorities and women, and has not developed and maintained a result-oriented, meaningful Affirmative Action Program."

*July 2, 1979, a revised Affirmative Action Plan was submitted.

*July 24, 1979 to December 17, 1979, the OFCCP made no attempt to conciliate any of the "major deficiencies" covered in the show cause notice.

*December 17, 1979, Dow received a letter from a new Assistant Regional Administrator for Region IX, San Francisco Office. It indicated Dow's "second submission has been fully evaluated and has been found to contain major deficiencies and thus, it does not represent a reasonable effort....Therefore, this matter has been referred to the Office of the Regional Solicitor, U.S. Department of Labor, for enforcement." The letter did not contain a suggested date for a conciliation conference or give any other indication, short of an enforcement action, that the OFCCP was willing to try to resolve its problems with the Affirmative Action Compliance Program.

*January 3, 1980, Dow sent the Department of Labor, Office of the Regional Solicitor, a letter requesting a meeting to resolve differences and drop the pending enforcement proceedings.

*January 14, 1980, following a telephone conversation on January 7, 1980, the Regional Solicitor's Office sent Dow a letter which said:

"While we do not agree with your contention that OFCCP has failed to follow its regulations with regard to conciliation, we would be willing to accept your request for the postponement of any enforcement action in order to give Dow an opportunity to meet with OFCCP to resolve its AACP deficiencies. We are doing this based on your acknowledgement and your January 3, 1980, letter that there are deficiencies in the second AACP and your representation that Dow wishes to resolve these deficiencies."

As a result of this letter, a meeting between the OFCCP Oakland Office and Dow was scheduled for February 7, 1980.

During the February 7, 1980 meeting, Dow made a presentation covering Dow's progress in the utilization of minorities and women and the internal audit procedure used to assure this progress.

There was a detailed discussion of Dow's Pittsburg-Walnut Creek organization, Dow's Job Group Concept, 8-Factor Availability Analysis considerations and Dow's procedure for setting goals to improve the utilization of minorities and women.

*February 13, 1980, the OFCCP Oakland Office summarized in letter form the February 7 meeting and requested four necessary revisions or additional information.

*March 4, 1980, a followup meeting to the February meeting was held at the OFCCP Oakland Office, at which time Dow was informed a new Equal Opportunity Specialist (EOS) would be handling the case. OFCCP personnel agreed that the revised AAP contained the additions agreed upon February 7, 1980. The EOS stated he had enough material to conduct the desk audit.

The Oakland Area Office Manager stated the show cause notice would "remain in place."

The Oakland Area Office Manager also said this matter could not be settled with anything less than a Conciliation Agreement.

*April 14 to 18, 1980, the onsite audit was conducted by the EOS. On April 14, 1980, the issues to be audited were defined as:

1. Concentrations of women and minorities in the workforce
2. Official & Manager Job Group
3. 8-Factor Availability Analysis
4. Focus Job Titles
5. Records Evaluation
   (Terminations, Applicant Files, Salaries)
6. Job Descriptions
7. Employee Interviews
8. Veterans & Handicapped AAP's

In general, the week was a cooperative effort.

One major area of disagreement was the hiring goal for Female Operatives. Dow's data showed a female applicant flow rate of 23 percent for operative jobs as a result of an extensive local advertising and recruiting effort. Many women disqualified themselves when informed the operative job involved a seven days on, two days off, rotating shift schedule.

The OFCCP, basing their data position on a Contra Costa county female workforce of 37.9%, consequently the EOS initially insisted on a 1980 hiring goal of 50%.

The onsite review was completed by a wrap-up session with Dow Pittsburg management, during which Dow agreed to hire Female Operatives at a 40% rate for one year beginning April 18, 1980.

*April 21, 1980, a letter containing all information agreed upon during the wrap-up session was sent to the Oakland Area Office.

*May 16, 1980, Dow officials called the EOS at the OFCCP to inquire about the status of the Dow review. The EOS was not available.

*May 19, 1980, the EOS called Dow. He said there was no problem with the review and he would complete his report and get back with us.

*June 11, 1980, the EOS called Dow. The Pittsburg EEO Mananger was in Midland.

*June 12, 1980, Dow officials returned the call. The EOS was in a meeting and Dow officials were told he'd return the call.

*June 16, 1980, Dow officials reached the EOS by phone. Dow was told to expect the Amended Show Cause in about 15 days.

*November 3, 1980, the OFCCP Oakland Office issued an Amended Show Cause letter which indicated there was an enclosure listing the alleged deficiencies. The enclosure was not included with the letter. Dow was given 30 days to respond.

*November 12, 1980, Dow received the Amended Show Cause attachment listing five deficiencies.

*December 11, 1980, Dow submitted answers to the alleged deficiencies in the 1980 Affirmative Action Program, to the OFCCP Oakland Area Office.

*December 12, 1980, Dow received a proposed Conciliation Agreement from the Oakland Area Office.

*December 23, 1980, Dow returned to the OFCCP Oakland Area Office a modified Conciliation Agreement signed by the Dow Western Division General Manager. Modifications were made to include statements specific to this audit.

*January 6, 1981, Dow called the EOS to ask about the OFCCP's feeling regarding the Conciliation Agreement Dow had returned to them. The EOS was unavailable.

*January 9, 1981, Dow received a letter from the OFCCP Oakland Area Office rejecting our proposals on the Conciliation Agreement.

*January 9, 1981, Dow received a new Conciliation Agreement under separate cover.

*January 16, 1981, Dow officials had still not received a call from the EOS so Dow called to clarify understanding of the January 6, 1981 letter that they were unable to accept Dow's changes.

*January 21, 1981, Dow officials (by letter) requested a meeting with the Director and EOS from the Oakland Area Office and the Area Regional Administrator.

*January 27, 1981, Dow, recognizing further negotiations over wording of the Conciliation Agreement were futile, called the Oakland Area Office to indicate Dow would accept OFCCP's General Provisions in combination with Dow's modifications of the Specific Provisions.

*February 5, 1981, Dow mailed a letter to the Oakland Area Office with a copy of the Conciliation Agreement. The Specific Provisions section contained the statement "OFCCP has found no affected classes or discrimination against minorities or women during this audit. This agreement corrects all of the deficiencies alleged by OFCCP of Executive Order 11246 as amended."

*March 18, 1981, Dow officials received, by certified mail, a signed Conciliation Agreement that was still subject to the disapproval of the Director of the OFCCP.

OFCCP AUDIT

LOUISIANA DIVISION

February 1979 - January 1981

In summation, this audit demonstrates:

1. OFCCP will not accept a company Affirmative Action Plan format differing from their guidelines inspite of a company's ability to explain how the plan meets its interpretation of 41 CFR 60.2 and to demonstrate success using the plan.
2. The EOS's did not interpret the Contract Compliance Manual in the same way. As a result, a change in EOS's during this audit required a change in company format.
3. OFCCP policies and procedures are inflexible.
4. OFCCP audits are time consuming. In this case 24 months.

The Office of Federal Contract Compliance Programs (OFCCP) initiated an affirmative action audit of Dow's Louisiana Division in February, 1979.

The audit was a result of potential contract negotiations between the Department of Energy (DOE) and Dow concerning DOE's request to use salt domes in Dow's Louisiana Division for strategic oil storage.

These contract negotiations, which have not yet resulted in a signed contract, prompted DOE to notify OFCCP, from whom an official request for the Louisiana Division Affirmative Action Plan was received on February 14, 1979.

*March 16, 1979, Louisiana Division personnel delivered the Affirmative Action Plan to the OFCCP District Office in New Orleans.

At this time the OFCCP officials challenged Dow's authority to self-regulate its Affirmative Action Plan. After confirming this authority with Washington, D.C. officials, Dow personnel were then informed the agreement was no longer in effect.

*March 21, 1979, a Letter of Deficiency was sent to Dow listing 11 AAP format deficiencies. Dow was to respond by April 6, 1979.

*April 10, 1979, Dow employees submitted, in person, a revised AAP and the requested support data to the OFCCP at the New Orleans office.

*April 13, 1979, the OFCCP sent a letter listing 12 deficiencies and a request to take immediate action to correct them.

*April 20, 1979, a telephone conference resulted in the OFCCP writing a clarification letter further defining the deficiencies mentioned in the April 13, 1979 letter.

*April 26, 1979, Dow submitted, again in person at the New Orleans Office, a response to the OFCCP letters of April 13 and 20, 1979. Each of the deficiencies was reviewed and appropriate attachment to the AAP submitted.

*May 24 and 25, 1979, an OFCCP representative visited the Louisiana Division to check salary data and lines of progression and to interview employees. At this time, OFCCP officials said Dow's AAP still does not meet the required format.

*July 27, 1979, a Show Cause notice was sent to Dow, stating Dow's AAP still contained three deficiencies. Thirty days were given for a reply.

*August 17, 1979, the OFCCP sent an additional definition of the deficiencies. This letter stated job groups must be by discipline (i.e. accountants, chemists); availability must be determined for these job groups;

underutilization must be calculated by organizational unit and job groups, and finally, goals and timetables must be calculated by job groups. Dow's Job Groups are based on salary levels and organizational units. The OFCCP would not, at this point in time, accept cross-discipline job groups containing people with similar salaries, similar responsibility levels and similar promotion opportunities. This concept was accepted later by a new EOS.

*September 14, 1979, following numerous meetings, Dow submitted an acceptable AAP.

*January 3, 1980, Dow signed a Conciliation Agreement which stated that all problems areas had been corrected.

*May 14, 1980, the OFCCP sent a letter, "revisions in your affirmative action program data are necessary." These revisions involved the Workforce Analysis, Utilization/Availability Analysis, and Goals and Timetables. A new OFCCP Equal Opportunity Specialist was now involved. Dow was to contact OFCCP by May 19 to schedule a meeting to resolve problems. Meetings held on May 29 and June 19, 1980.

*June 27, 1980, the OFCCP sent Dow a revised Conciliation Agreement with request to sign and return within five days.

*July 1, 1980, Dow signed the Conciliation Agreement.

*September 22, 1980, the OFCCP rescinds the show cause letter dated July 27, 1979.

*February 4, 1981, New Orleans OFCCP office notifies Dow, by letter, that the National office approved the Conciliation Agreement on January 8, 1981.

OFCCP AUDIT

JOLIET PLANT - CENTRAL DIVISION

March - August, 1979

In summation, this audit demonstrates:

1. OFCCP can, at a small plant site of 75 people, accept format variations.
2. OFCCP audits can be efficient. In this case 4 months.
3. OFCCP audits identify areas of concern already known to a company with an effective Affirmative Action Program.

It is not apparent why Dow's Joliet, Illinois Plant underwent an OFCCP audit.

*March 12, 1979, the OFCCP Chicago Southwest Office requested the Affirmative Action Plan from the Joliet Plant.

*April 12, 1979, Dow submitted the Affirmative Action Plan by certified mail.

*June 11, 1979, the OFCCP Equal Opportunity Specialist called to schedule an onsite audit. Due to business travel and vacation plans of the Plant Manager and Employee Relations Manager, Dow requested the audit be postponed until after July 10, 1979.

*July 11-13, 1979, the OFCCP onsite audit was conducted. The audit was constructive in nature and involved positive negotiations. No major problems were discovered.

*August 9, 1979, the OFCCP proposed a Letter of Commitment requiring Dow to make a concerted effort to hire a female minority into the Office & Clerical category and a minority male into the Craftsmen category. Dow was already in the process of hiring the minority female Office & Clerical as part of its Affirmative Action Program.

*August 13, 1979, Dow signed the Letter of Commitment.

OFCCP AUDIT

LUDINGTON, MICHIGAN PLANT

CENTRAL DIVISION

May, 1979 - September, 1980

In summation, this audit represents:

1. OFCCP issues Show Cause notices based on alleged deficiencies in the format of a company's Affirmative Action Plan.
2. OFCCP will proceed to Administrative Procedures solely on the basis of Affirmative Action Plan format deficiencies.

The Office of Federal Contract Compliance Programs (OFCCP) in Grand Rapids, Michigan initiated an Affirmative Action Program audit of Dow Chemical's Ludington, Michigan plant on the basis of a handicapped discrimination suit filed in January, 1979, according to the OFCCP Equal Opportunity Specialist.

Notification of the audit came May 11, 1979, when the OFCCP office in Grand Rapids sent the Ludington Plant a letter requesting its Affirmative Action Plan.

*June 11, 1979, the requested information was sent by Dow to the Grand Rapids OFCCP Office.

*June 14, 1979, the Area Director of the OFCCP Grand Rapids Office sent Dow a Show Cause notice listing nine deficiencies in the submitted Affirmative Action Plan. This was the only communication with Dow prior to the Show Cause notice, therefore, there was no opportunity to conciliate the deficiencies.

The Show Cause notice was issued because of three alleged major deficiencies: Workforce Analysis, Availability and Utilization Analysis, and Goals and Timetables.

*July 11, 1979, a revised AAP, along with a letter of explanation from Dow was submitted to the Grand Rapids OFCCP Office. Several attempts were made to communicate via telephone between Dow and the OFCCP. No serious negotiations, however, took place.

*April 24, 1980, Dow was told the case had been turned over to the Regional Solicitor's Office, Chicago, Illinois, for resolution and that it was the Solicitor's recommendation that an Administrative Complaint be filed.

Dow expressed its concern that little effort had been made to conciliate these problems. In fact, no written communication had been received from the OFCCP regarding the July 11, 1979 submission by Dow.

At this time, it was agreed that:

1. The Area Director would attempt to stop the Administrative Complaint Proceeding.
2. The 1980 Ludington AAP would be evaluated as an updated submission.
3. If necessary, an amended Show Cause would be issued related to the 1980 AAP.

*April 28, 1980, the June 14, 1979 Show Cause notice was amended by a letter listing four alleged violations of the 1980 Ludington AAP.

*May 14, 1980, Dow personnel visited the Grand Rapids OFCCP Office to submit and discuss a revised 1980 AAP. They were told the Grand Rapids Office had written a memorandum which should hold the Administrative Complaint in abeyance. On-site audit was scheduled.

*June 3, 1980, the on-site audit began. The EOS and his assistant reviewed Personnel Policies, Applicant Flow Data, Salaries, Availability Calculations, and Goals and Timetables. A number of employees were also interviewed.

At the wrap-up session, the EOS indicated only minor deficiencies remained and the solution to these had generally been agreed upon during the on-site audit.

Regardless, the EOS indicated this audit could not be resolved by a Letter of Commitment because the Show Cause notice had been issued June 14, 1979. Dow felt the Show Cause was erroneously issued since Dow's progress showed continuing improvement in the utilization of minorities and women.

*June 18, 1980, Dow received a proposed Conciliation Agreement identifying the outstanding alleged AAP deficiencies/violations.

*July 10, 1980, Dow personnel met with OFCCP personnel at the Grand Rapids, Michigan office to discuss proposed Dow modifications in the Conciliation Agreement.

Dow officials again requested resolution by a Letter of Commitment. They were told this was not possible due to policy; a Show Cause letter requires a Conciliation Agreement.

*July 14, 1980, except for the addition of the word "alleged" in front of the word violation, the OFCCP could not agree to any substantive changes in the General Provisions. All changes to the Specific Provisions and Reporting Sections were accepted including the statement "OFCCP has found no affected classes or discrimination against minorities and women during the audit."

*July 17, 1980, the Conciliation Agreement, as corrected, was forwarded to the Grand Rapids OFCCP Office for final approval. This agreement was subsequently signed by Dow on July 30, 1980, the Grand Rapids OFCCP Office signed the agreement August 11, 1980, and the Chicago Regional Office signed on September 18, 1980.

LATIN AMERICA OFFICE

OFCCP AUDIT

January - May, 1981

In summation, this audit demonstrates:

1. OFCCP audits can proceed smoothly if a company's Affirmative Action Plan format meets their interpretation of 41 CFR 60.2.
2. OFCCP audits should find very few "new" areas of concern when auditing a company committed to an effective Affirmative Action Program.

The Dow Chemical Company Latin America Office is the Headquarters Unit for the Dow Latin America Area. It has a workforce of 175 personnel. The OFCCP Equal Opportunity Specialist could not explain why this office was chosen for an audit.

*January 30, 1981, the Latin America Office received the Standard OFCCP request for the Affirmative Action Programs.

*March 5, 1981, Dow officials submitted the information and reviewed it with the Equal Opportunity Specialist in the OFCCP Office in Miami. The only format question raised during this meeting involved the Workforce Analysis.

*March 6, 1981, a revised Workforce Analysis was submitted to the OFCCP.

*April 1, 1981, first-quarter data concerning applicants, hires, intracategory promotions, intercategory promotions, transfers in, transfers out and terminations were submitted as promised.

*May 4-8, 1981, the onsite audit was conducted by the OFCCP Equal Opportunity Specialist. It was a routine audit. No further AAP format problems were uncovered.

*May 21, 1981, the audit wrap-up session was held with Dow management. The only area of concern involved Dow's efforts to recruit Blacks into the Professional and Office & Clerical EEO-1 categories. This had also been identified as a problem by the Dow Internal Audit Procedure and steps were in place to correct the situation. A Letter of Commitment outlining corrective measures and timeframe was proposed.

*May 22, 1981, Dow signed the Letter of Commitment.

The CHAIRMAN. Our next witness will be Ms. Althea Simmons, director of the Washington Bureau of the National Association for the Advancement of Colored People.

Ms. Simmons, we are always happy to have you appear before the committee.

STATEMENT OF ALTHEA T. L. SIMMONS, DIRECTOR OF WASHINGTON BUREAU, NAACP, WASHINGTON, D.C., ACCOMPANIED BY LEZLI BASKERVILLE, BUREAU COUNSEL

Ms. SIMMONS. Thank you very much, Mr. Chairman.

With your permission, I would like to have our bureau counsel, Ms. Lezli Baskerville, accompany me.

The CHAIRMAN. We are very happy to have both of you.

Ms. SIMMONS. My name is Althea T. L. Simmons. I am director of NAACP's Washington Bureau. We are very pleased to be asked to appear before this committee at this time to give you our views with reference to affirmative action.

My organization, Mr. Chairman, has a constituency of persons that affirmative action was designed to benefit. The NAACP is a 72-year-old civil rights membership organization with some 1,800 branches, 600 youth and college divisions, and 38 State and area conferences in all 50 States and the District of Columbia. We unequivocally support affirmative action.

Some years ago, I was privileged to have been one of the persons who participated in a series of consultant hearings that the Labor Department put together of business, women's groups, civil rights, labor, and educational groups to help develop revised order 4. We are solidly in support of the use of numerical goals and timetables. Frankly, we are at a loss to understand the animosity that is generated by fair play which would insure that all Americans be afforded an opportunity to enter and be productive in the workplace.

We believe very strongly that there is a need for Executive Order 11246. It is a vital part of this country's effort to achieve equal employment opportunity because that goal has not yet been realized. The unemployment rate for black adults continues to be double that of white adults. The median income of all black families is little more than 50 percent of that of white families. Black youth unemployment is currently at 40 percent as compared to 16 percent for white youth.

These disparities are directly related to the historical and contemporary unequal treatment of blacks. Until that gap is closed, Mr. Chairman, between black and white employment, and income levels, there remains a need for enhancing and enforcing Executive Order 11246.

That order, was issued at a time when there was an abundance of evidence that racial and sexual discrimination remained manifest in the public labor force despite previous legislative and executive efforts to redress the situation.

Particularly alarming then, and it is alarming now, is that there is an underutilization of blacks, Hispanics, and females in the work force of Federal contractors. An examination of the depth and the incident of inequality leads to the conclusion that there was an urgent need for expansive and special efforts to promote full equality of employment opportunity.

We believe that the Executive order is a valid exercise of executive power and has the force and effect of law. That has been well established by case law. We also believe, Mr. Chairman, that the order and its implementing regulations have played an important role in helping to shape the work force of Government contractors so that they fairly represent the makeup of qualified workers available in the relevant labor force.

Ms. Baskerville, our bureau counsel, talked to OFCCP on July 25, and found out that since the 1978 reorganization, more than 11,666 complaints of discrimination have been received by OFCCP. We found that 3,747 of those have been resolved by OFCCP and others have been referred to the EEOC for resolution. The office has completed 6,217 compliance reviews and issued 779 show cause orders. Sixty-five administrative complaints have been issued and nine contractors have been debarred. Since 1979, there have been 1,735 financial settlements with minorities and 12,899 with women. While these enforcement efforts have yielded minor positive results, there is still a continuing need for vigorous enforcement of the order.

I was quite intrigued with the amount of paperwork that we saw displayed by two of the previous witnesses here this morning. I was just sorry that I could not have brought to this room a large number of unemployed people who have requisite qualifications, and who have been turned down by educational institutions who have been turned down by Federal contractors, together with the large number of complaints that are in our files housed in the Library of Congress that would show the kinds of evidence that there is still a need for an order like 11246 if we are going to have equal employment opportunity in our country.

We think that in any Federal bureaucracy there is some waste, We oppose waste. We think something should be done to try and minimize it. We do have problems, however, with the continued complaints regarding too much paperwork by those who would feed at the Federal trough.

We believe that if a person wants to discriminate, they should not discriminate using taxpayers' money. We believe that something must be done so that the fundamental right to compete equally for positions in the work force of Government contractors without regard to race, color, or non bona fide occupational qualifications must be protected at all times.

The contractor's obligation to recruit, employ, and promote qualified members of a victimized class must be enforced regardless of the political climate, or regardless of the fact that it means additional reporting requirements.

The **Chairman.** Ms. Simmons, I disagree with you. You made the comment that these businesses should not discriminate with Federal money, with taxpayers' money.

Ms. **Simmons.** Yes.

The **Chairman.** I do not think they should discriminate with anybody's money.

Ms. **Simmons.** I do not either, but right now we are talking about Federal money.

The **Chairman.** I understand, but the law says there shall be no discrimination.

Ms. **Simmons.** That is right.

What we have, Senator, as you are well aware of, is that affirmative action has become a concept that everybody says they agree with, but nobody really wants to do anything about it. When you start talking in terms of how you are going to actively put an affirmative action program in place, what you are going to do to insure that minorities and women are not discriminated against, then that is when the rub starts.

I have over the years routinely tested educational institutions because we had a tremendous number of complaints about discrimination in educational institutions. In checking, let us say, the roster of faculty and personnel, it was interesting to note that blacks and women was mainly in the instructor, lecturer, or assistant professor category; sometimes you found an associate professor. When we talk about full professors, we found very few of those who were minority group members or who were women.

I also found that a number of persons of my race and other minorities were employed as the affirmative action officers. Then the university felt it had done its job with reference to minorities and women.

I targeted States in going for interviews. I targeted my own State of California. I found that, regardless of qualification, it was almost impossible to move into the nontraditional areas if you happened to be female or if you happened to be black or another minority.

In sum, we have a more extensive statement that I would like to have entered into the record.

The **Chairman.** Without objection, it will be placed in the record following your oral presentation.

Ms. **Simmons.** Mr. Chairman, we believe that you do not throw the baby out with the bath water. The OFCCP has a role to play. There could be tightening up with reference to how the requirements are made, but we do not believe that the contractors should be the ones to set the requirements that they must then follow in order to receive Federal funds.

Equal employment opportunity is not yet a reality for many black Americans. Until equal employment is achieved, there remains a need for aggressive enforcement of Executive Order 11246.

In my oral testimony, I will not get into a discussion of what we think about the proposed regulations, or the proposal made by one of the Members of Congress that is also being considered. We have addressed both issues, it is in my written statement.

I will be glad to answer any questions.

The **Chairman**. What is your general opinion of the regulations that are being proposed, just in a few sentences if you can?

Ms. **Simmons**. We think that the change in the threshold is a mistake. We believe that raising the threshold of the dollar amount would be a mistake because too many plants and institutions would come out from under it.

We think that some attention should be given to not only insuring that contractors are in compliance, but also that the regulations are not "burdensome." From the information we received from the regulatory task force, we believe that if they go through with the proposed regulations, it will end up with almost nobody under the compliance provision.

The **Chairman**. You say that the objective of Executive Order 11246 is to achieve parity. What do you mean by parity?

Ms. **Simmons**. By parity, we mean that there is a fair representation of blacks, Hispanics, and women in all areas and all levels of employment. Fair representation means persons who could reasonbly be expected to have been in the work force absent discrimination. We do not pull up a magic number. We are talking in terms of giving people the opportunity to move forward in the work force.

The **Chairman**. Assuming that parity is achieved, would that then do away with the necessity of affirmative action programs?

Ms. **Simmons**. As a matter of fact, back when the affirmative action guidelines were put in place, we felt it was a 5-year program because affirmative action, we believe, should be designed to remove the barriers. Once the barriers are removed, then you move into neutrality.

The **Chairman**. You say that since 1978, OFCCP has issued 779 show cause notices, 65 administrative complaints, and debarred 9 contractors. You also point out that thousands of back pay claims have been resolved by OFCCP through imposition on contractors. Do you have any figures showing how all this has created new job opportunities for minorities and women?

Ms. **Simmons**. No, we do not. We asked for that kind of information from OFCCP. They told us they did not have that information available.

The **Chairman**. Would you not think that should be the bottom line information they would want to obtain to see if these programs really are working and if their regulatory practices are working?

Ms. **Simmons**. We would like to have that kind of information. One of the things the Department of Labor told us was that they had reviewed the impact of the use of goals and timetables on minority employment. DOL officials also stated that their experience had been that goals and timetables were the most effective means for increasing the number of women and minorities in employment areas from which they have been excluded previously because of race and sex.

For example, minority participation in apprenticeships in individual construction programs has increased measurably as a result of the use of goals and timetables.

We also asked for additional kinds of information from OFCCP in order to do a better job ourselves of monitoring as an advocacy group.

The **Chairman**. If Federal contractors are found guilty of discrimination for failure to promote particular women and minorities, how are those aggrieved individuals helped if the OFCCP takes work away from the contractors in a disbarment proceeding?

Ms. **Simmons**. They are not helped per se because in large measure they are not in the workforce. That is part of our complaint. However, we do believe if a contractor is going to use Federal funds, that contractor, regardless of whether they have minorities or not, should not discriminate.

The **Chairman**. In your opinion, is it not more appropriate to remedy past discrimination in title VII proceedings?

Ms. **Simmons**. No, we do not think so because the contractor can continue to use Federal funds under title VII. We believe you have to have some mechanism whereby contractors realize that if they discriminate, there is a sanction against them.

The **Chairman**. You speak of the need for a private right of action under Executive Order 11246. Why is the private right of action available under title VII not sufficient to redress discriminatory practices?

Ms. **Simmons**. If the Government was doing its job, there would be no such need. However, because the government has been remiss in its enforcement effort, because most likely it will continue to be so, based on the restriction in budget and staff reductions, and because of, in some instances, a lack of desire to enforce the Order, we believe that the intended beneficiaries need the right to be sure that the contractor is sanctioned for his conduct, which means cancellation of the contract. There should be some restitutional relief in some kind of action.

We are not quite sure, but my counsel advised me there may be an implied right of action under the order as it is presently presented. She quotes the case of *Cannon* v. *University of Chicago.*

The **Chairman**. I agree with your statement that contractors may need guidance when undertaking affirmative action programs. Do you realize that nearly every contractor who has testified before this committee is complaining that the OFCCP has been unwilling to provide that very guidance that you are suggesting here?

Ms. **Simmons**. I disagree with that, Mr. Chairman. Let me tell you why. If you take a look at subpart B of chapter 60 of the OFCCP regs, they are quite explicit with reference to the minimum requirements of an AAP. You need a workforce analysis and what have you.

I believe that if OFCCP is unwilling to provide any other assistance a contractor may need, then perhaps you need to change the enforcement section to another agency, for example EEOC. I definitely feel there must be guidelines.

The **Chairman**. Just for your information, that may be one of the things that comes out of these hearings.

Ms. **Simmons**. In just listening to the testimony preceding me, witnesses talked in terms of the detailed information that OFCCP requires. It appears they are getting guidance. Although they may not like the guidance that they get.

The **Chairman**. Thank you so much. We appreciate your testimony.

Ms. **Simmons**. Thank you, Mr. Chairman, for allowing us to appear.

The **Chairman**. We are always happy to have you appear.

[The prepared statement of Ms. Simmons follows:]

STATEMENT OF ALTHEA T. L. SIMMONS, DIRECTOR OF THE WASHINGTON BUREAU OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE, THURSDAY, JULY 30, 1981

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, I APPRECIATE THE INVITATION TO APPEAR BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE. MY NAME IS ALTHEA T.L. SIMMONS. I AM DIRECTOR OF THE WASHINGTON BUREAU OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP). I AM HAPPY TO APPEAR BEFORE YOU TODAY TO SHARE WITH YOU THE VIEWS OF THE NAACP ON A SUBJECT OF IMPORTANCE AND CONCERN TO US--EQUAL EMPLOYMENT OPPORTUNITIES IN GOVERNMENT CONTRACTING. SPECIFICALLY, I HAVE BEEN ASKED BY THE CHAIRMAN TO DISCUSS WITH YOU THE ROLE EXECUTIVE ORDER 11246 PLAYS IN THE GOVERNMENT'S EFFORT TO ELIMINATE SYSTEMIC DISCRIMINATION FROM THE AMERICAN LABOR FORCE; THE ROLE THE OFCCP PLAYS IN ENFORCING THE ORDER; AND TO RECOMMEND TO YOU WAYS IN WHICH THE ORDER CAN BE STRENGTHENED TO MAKE IT A MORE EFFECTIVE TOOL FOR ACHIEVING EQUAL EMPLOYMENT OPPORTUNITY.

INTRODUCTION

EXECUTIVE ORDER 11246 IS A VITAL PART OF THIS COUNTRY'S EFFORT TO ACHIEVE EQUAL EMPLOYMENT OPPORTUNITY. THE GOAL OF EQUAL EMPLOYMENT HAS NOT YET BEEN REALIZED. THE UNEMPLOYMENT RATE FOR BLACK ADULTS CONTINUES TO DOUBLE THAT OF WHITE ADULTS. THE MEDIAN INCOME OF ALL BLACK FAMILIES IS LITTLE MORE THAN 50% OF THAT OF WHITE FAMILIES. BLACK YOUTH UNEMPLOYMENT IS CURRENTLY AT ABOUT 40% AS COMPARED WITH 16% FOR WHITE

YOUTH. THESE DISPARITIES ARE DIRECTLY RELATED TO THE HISTORICAL AND CONTEMPORARY UNEQUAL TREATMENT OF BLACKS.

UNTIL THE GAP IS CLOSED BETWEEN BLACK AND WHITE EMPLOYMENT AND INCOME LEVELS, THERE REMAINS A NEED FOR ENHANCING AND ENFORCING EXECUTIVE ORDER 11246. THE NAACP SUPPORTS ALL PROPOSALS TO STRENGTHEN THE ORDER TO MAKE IT MORE EFFECTIVE AND OPPOSES ANY PROPOSAL TO DISMANTLE THE SAME.

EXECUTIVE ORDER 11246

EXECUTIVE ORDER 11246 WAS ISSUED AT A TIME WHEN THERE WAS AN ABUNDANCE OF EVIDENCE THAT RACIAL AND SEXUAL DISCRIMINATION REMAINED MANIFEST IN THE PUBLIC LABOR FORCE, DESPITE PREVIOUS LEGISLATIVE AND EXECUTIVE EFFORTS TO REDRESS THE SITUATION. PARTICULARLY ALARMING WAS THE UNDERUTILIZATION OF BLACKS, HISPANICS, AND FEMALES IN THE WORK FORCES OF FEDERAL CONTRACTORS. EXAMINATION OF THE DEPTH AND INCIDENCE OF INEQUALITY LEAD TO THE CONCLUSION THAT THERE WAS "AN URGENT NEED FOR EXPANSION AND STRENGTHENING OF EFFORTS TO PROMOTE FULL EQUALITY OF EMPLOYMENT OPPORTUNITY . . ." 26 FED. REG. 1977 (MARCH 8, 1961); AND THAT BENIGN NEUTRALITY IN EMPLOYMENT PRACTICES, AFTER YEARS OF INVIDIOUS DISCRIMINATION, WAS INSUFFICIENT TO ACHIEVE FULL EQUALITY OF EMPLOYMENT OPPORTUNITIES. IT WAS CONCLUDED THAT A POLICY OF NON-DISCRIMINATION IN EMPLOYMENT, WITHOUT MORE, WOULD PERPETUATE THE STATUS QUO ANTE INDEFINITELY. WHAT WAS NEEDED, AND WHAT EXECUTIVE ORDER 11246 AND ITS IMPLEMENTING REGULATIONS PROVIDE IS A THREE-FOLD APPROACH TO ACHIEVING PARITY:

(1) THE REQUIREMENT THAT ALL FEDERAL CONTRACTORS ESTABLISH NON-DISCRIMINATORY EMPLOYMENT POLICIES AND PRACTICES; (2) THAT THEY TAKE POSITIVE STEPS TO RECRUIT, EMPLOY AND PROMOTE QUALIFIED BLACKS, HISPANICS, AND WOMEN; AND (3) THAT SANCTIONS BE USED TO ENFORCE THE NON-DISCRIMINATION/AFFIRMATIVE ACTION REQUIREMENT WHEN VOLUNTARY COMPLIANCE FAILS. EXECUTIVE ORDER 11246 AND ITS IMPLEMENTING REGULATIONS REQUIRE FEDERAL CONTRACTORS TO PROVIDE EQUAL EMPLOYMENT OPPORTUNITIES TO ALL APPLICANTS AND EMPLOYEES, WITHOUT REGARD TO RACE, COLOR, NATIONAL ORIGIN OR SEX. FEDERAL CONTRACTORS WHO HAVE A WORKFORCE OF 50 OR MORE EMPLOYEES AND A GOVERNMENT CONTRACT OF $50,000 OR MORE[1] ARE REQUIRED TO PREPARE AND IMPLEMENT AFFIRMATIVE ACTION PLANS (AAP'S) WHICH INCLUDE THE SETTING OF GOALS AND TIMETABLES FOR INCREASING THE NUMBERS OF BLACKS, HISPANICS, AND WOMEN IN WORKFORCES WHERE THEY ARE UNDERUTILIZED; AND THE DEVELOPMENT OF ACTION PROGRAMS DESIGNED TO ACHIEVE THESE GOALS WITHIN SPECIFIED TIME FRAMES.

THE ORDER DELEGATED ENFORCEMENT RESPONSIBILITY TO THE SECRETARY OF LABOR WHO ESTABLISHED THE OFFICE OF FEDERAL CONTRACT COMPLIANCE (OFCC) AND DELEGATED TO IT THE AUTHORITY TO CARRY OUT THE RESPONSIBILITY FOR IMPLEMENTING THE REQUIREMENTS OF THE ORDER. THE OFCC HAS PROMULGATED RULES, REGULATIONS, GUIDELINES AND ORDERS TO ESTABLISH REQUIREMENTS FOR EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION TO INCREASE THE UTILIZATION OF BLACKS AND OTHERS IS A FEDERAL CONTRACTOR'S WORKFORCE, WHERE THEY ARE UNDERUTILIZED.[2]

THAT THE EXECUTIVE ORDER IS A VALID EXERCISE OF EXECUTIVE POWER AND HAS THE FORCE AND EFFECT OF LAW IS NOW WELL ESTABLISHED. ONE OF THE EARLIEST JUDICIAL PRONOUNCEMENTS TO THIS EFFECT WAS CONTRACTORS

ASSOCIATION OF EASTERN PENNSYLVANIA V. SECRETARY OF LABOR, 442 F. 2d 159 (3rd CIR. 1971) CERT. DENIED, 404 U.S. 854 (1971), WHERE THE POPULARIZED "PHILADELPHIA PLAN" WAS UPHELD;[3] AND THE USE OF GOALS AND TIMETABLES TO INCREASE THE UTILIZATION OF BLACKS IN THE WORKFORCES OF FEDERAL CONTRACTORS--EVEN ABSENT A JUDICIAL FINDING OF PAST DISCRIMINATION--WERE HELD TO BE A NECESSARY PART OF THE FEDERAL REMEDIAL EFFORT. ID., AT 175.

ALTHOUGH THERE WAS NO SUPREME COURT REVIEW OF CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, SUPRA., AND THE SUPREME COURT HAS NOT DIRECTLY ADDRESSED THIS ISSUE,[4] OTHER FEDERAL COURTS HAVE AFFIRMED THE POSITION OF THE 3rd CIRCUIT. SEE, UNITED STATES V. NEW ORLEANS PUBLIC SERVICE, INC., 553 F.2d 459 (5TH CIR. 1977), VACATED AND REMANDED ON OTHER GROUNDS, 436 V.S & 42 (1978); SOUTHERN ILL. BUILDERS ASS'N V. OGILVIE, 471 F.2d 680 (7th CIR. 1972); UNIROYAL, INC. V. MARSHALL, 482 F.SUPP. 364, 368 (1979) AND CASES CITED THEREIN; UNITED STATES V. MISSISSIPPI POWER AND LIGHT CO., 21 FCP 445 (S.D. MISS. 1979): UNITED STATES V. DUQUESNE LIGHT CO., 443 F.SUPP. 507, 510 (W.D. PA. 1976): CROWN CENTRAL PETROLEUM V. KLIPPE, 424 F.SUPP. 744 (1976).

THE ORDER AND ITS IMPLEMENTING REGULATIONS HAVE PLAYED AN IMPORTANT ROLE IN HELPING TO RESHAPE THE WORKFORCE OF GOVERNMENT CONTRACTORS SO THAT THEY MORE FAIRLY REPRESENT THE MAKE-UP OF QUALIFIED WORKERS AVAILABLE IN THE RELEVANT LABOR FORCE.

SINCE THE 1978 REORGANIZATION, MORE THAN 11,666 COMPLAINTS OF DISCRIMINATION HAVE BEEN RECEIVED BY THE OFCCP. 3,747 OF THESE COMPLAINTS HAVE BEEN RESOLVED BY THE OFCCP, OTHERS WERE REFERRED TO THE EEOC FOR RESOLUTION. THE OFFICE COMPLETED 6,217 COMPLIANCE REVIEWS AND ISSUED 779

SHOW CAUSE NOTICES. 65 ADMINISTRATIVE COMPLAINTS HAVE BEEN ISSUED AND 9 CONTRACTORS HAVE BEEN DEBARRED. SINCE 1979, THERE HAVE BEEN 1735 FINANCIAL SETTLEMENTS WITH "MINORITIES", AND 12,899 WITH WOMEN.[5]

WHILE THESE ENFORCEMENT EFFORTS HAVE YIELDED MINOR POSITIVE RESULTS, THERE IS STILL A CONTINUING NEED FOR VIGOROUS ENFORCEMENT OF THE ORDER.

UNTIL 1978, THERE WAS DECENTRALIZED ENFORCEMENT. THE DEPARTMENT OF LABOR DESIGNATED 13 (LATER REDUCED TO 11) FEDERAL AGENCIES TO ENFORCE THE PROVISIONS OF THE REGULATIONS AS THEY APPLIED TO SPECIFIC INDUSTRIES. THE OFCC POORLY COORDINATED THESE EFFORTS. THERE WERE DUPLICATIVE ENFORCEMENT EFFORTS BY SOME AND LITTLE OR NO ENFORCEMENT EFFORTS BY AGENCIES WHICH VIEWED THE FEDERAL EFFORT TO ACHIEVE EQUAL EMPLOYMENT AS UNRELATED TO THEIR CHARGE.

WITH THE REORGANIZATION PLAN OF 1978, ENFORCEMENT EFFORTS ARE NOW CENTRALIZED. BUT EVEN WITH CENTRALIZED ENFORCEMENT, PROBLEMS REMAIN. THE GOVERNMENT STILL DOES NOT VIGOROUSLY ENFORCE THE ORDER. IT HAS BEEN RELUCTANT TO SUSPEND CONTRACTS OR DEBAR CONTRACTORS, PARTICULARLY EDUCATIONAL INSTITUTIONS. WHILE SEVERAL SCHOOLS HAVE HAD THEIR FUNDS DELAYED, NO COLLEGE OR UNIVERSITY HAS EVER HAD ITS FEDERAL FUNDS TERMINATED BECAUSE OF THE FAILURE TO MEET THE FEDERAL REGULATION GOVERNING THE CONTRACT COMPLIANCE PROGRAMS.

THERE IS CLEARLY A NEED FOR INTENSIFIED ENFORCEMENT EFFORTS. WITH THE PROPOSED BUDGET AND PERSONNEL REDUCTIONS, AND THE PRESENT POLITICAL CLIMATE, IT IS UNLIKELY THAT SUCH EFFORTS WILL BE FORTHCOMING FROM THE GOVERNMENT. THEREFORE, THE NAACP PROPOSES THAT THE REGULATIONS

BE AMENDED TO PROVIDE FOR A PRIVATE RIGHT OF ENFORCEMENT BY THE INTENDED BENEFICIARIES OF THE ORDER.

THE COURTS HAVE UNIFORMLY HELD THAT IN ITS PRESENT FORM, EO 11246 PROVIDES NO BASIS FOR A PRIVATE RIGHT OF ACTION AGAINST A CONTRACTOR WHICH DOES NOT COMPLY WITH THE EQUAL OPPORTUNITY/AFFIRMATIVE ACTION REQUIREMENT, FLORA V. MOORE, 21 FEP 298 (N.D. MISS. 1979): COP V. LeHIGH UNIVERSITY, 433 F.SUPP. 1275 (E.D. PA. 1977); GORMAN V. UNIVERSITY OF MIAMI, 414 F.SUPP. 1022 (S.D. FLA. 1976); MASCO V. UNITED AIRLINES, 13 EPD 11,578 (W.D. PA. 1976); AND THAT ENFORCEMENT OF THE ORDER AGAINST A CONTRACTOR IS LEFT TO THE APPROPRIATE GOVERNMENT AGENCY. LEAVING ENFORCEMENT TO THE GOVERNMENT IS DANGEROUS, HOWEVER, BECAUSE IN INSTANCES SUCH AS THE PRESENT, WHERE WE HAVE AN ADMINISTRATION WHICH APPEARS TO BE INSENSITIVE TO ITS OBLIGATION TO ENFORCE THE NATION'S EQUAL EMPLOYMENT POLICY, ENFORCEMENT EFFORTS WILL WANE OR CEASE.

THE FUNDAMENTAL RIGHT TO COMPETE EQUALLY FOR A POSITION IN THE WORKFORCE OF GOVERNMENT CONTRACTORS WITHOUT REGARD TO RACE OR OTHER NON BONA-FIDE OCCUPATIONAL QUALIFICATIONS, MUST BE PROTECTED AT ALL TIMES REGARDLESS OF THE SENTIMENT OF THE ADMINISTRATION.. THE CONTRACTORS' OBLIGATION TO RECRUIT, EMPLOY AND PROMOTE QUALIFIED MEMBERS OF THE VICTIMIZED CLASS MUST BE ENFORCED REGARDLESS OF THE POLITICAL CLIMATE. TO ENSURE THE INTENDED BENEFICIARIES REDRESS REGARDLESS OF THE POLITICAL TIDE, OR THE GOVERNMENT'S FISCAL OR PHYSICAL ABILITY TO ENFORCE THE ORDER, THE REGULATIONS MUST BE AMENDED TO PROVIDE A PRIVATE RIGHT OF ACTION.

ATTEMPTS TO DISMANTLE EXECUTIVE ORDER 11246

WE ARE TODAY WITNESSING A DISTURBING PATTERN OF RETROGRESSION AND DENIGRATION FROM THIS COUNTRY'S COMMITMENT TO ENSURING ALL PERSONS FULL AND EQUAL OPPORTUNITY IN THE EMPLOYMENT SPHERE, REGARDLESS OF THE COLOR OF THEIR SKIN, THEIR RACE, NATIONAL ORIGIN, OR GENDER. PARTICULARLY OFFENSIVE ARE SOME RECENT PROPOSALS BY MEMBERS OF CONGRESS AND THE DEPARTMENT OF LABOR TO CHANGE EXECUTIVE ORDER 11246. THIS PRESIDENTIAL PROGRAM, WHICH HAS BEEN SUPPORTED BY PRESIDENTS OF BOTH PARTIES FOR THE PAST FORTY YEARS[6] MUST NOT BE DISMANTLED UNDER THE GUISE OF BUDGET AND PERSONNEL REDUCTIONS IN THE CONTRACT COMPLIANCE PROGRAM, OR REGULATORY CHANGES IN THE FEDERAL CONTRACT COMPLIANCE EFFORT. THE NAACP LIKEWISE OPPOSES ANY CONGRESSIONAL AMENDMENT WHICH WILL MAKE THE OFCC IMPOTENT TO ENFORCE THE ORDER. WE ARE DISMAYED BY CONGRESSMAN PAUL McCLOSKEY'S PROPOSAL FOR PRESIDENT REAGAN TO RESCIND THE EXECUTIVE ORDER AND REPLACE IT WITH A REVISED ORDER.

SELF-MONITORING PROPOSAL IS OBJECTIONABLE

REPRESENTATIVE PAUL McCLOSKEY, JR., HAS PROPOSED THAT PRESIDENT REAGAN RESCIND EXECUTIVE ORDER 11246 AND REPLACE IT WITH A REDUCED PROGRAM WHICH RELIES PRIMARILY ON SELF-MONITORING BY GOVERNMENT CONTRACTORS. THE PROPOSAL WOULD REDUCE BY 50% THE NUMBER OF OFCC EMPLOYEES WHO AUDIT AND ENFORCE THE ORDER. IT WOULD DIMINISH THE REPORTING REQUIREMENTS FOR CONTRACTORS, DRASTICALLY REDUCE THE USE OF AAP'S, AND REPLACE THE REQUIREMENT THAT CONTRACTORS USE GOALS AND TIMETABLES FOR INCREASING THE

UTILIZATION OF BLACKS, HISPANICS, AND WOMEN IN A WORK FORCE, WITH ANY "RELEVANT AND FEASIBLE" AAP. MOREOVER, UNDER THE McCLOSKEY PLAN AN AAP WOULD ONLY BE REQUIRED WHERE A CONTRACTOR'S OVERALL EMPLOYMENT OF BLACKS, HISPANICS AND WOMEN AND RATE OF HIRING AND PROMOTING THE SAME DURING THREE CONSECUTIVE YEARS PROCEEDING, FALL SHORT OF AVAILABILITY. THE PROPOSAL WOULD DRASTICALLY REDUCE THE SANCTIONS WHICH CAN BE IMPOSED FOR VIOLATIONS OF THE ORDER AND STRIP THE SECRETARY OF LABOR OF DISCRETION TO ISSUE RULES AND REGULATIONS.

THE McCLOSKEY PROPOSAL IS OBJECTIONABLE WITH REGARD TO EACH OF THESE PROPOSED CHANGES.

GOALS AND TIMETABLES

HISTORY HAS TAUGHT US THAT AFFIRMATIVE STEPS WILL NOT BE VOLUNTARILY TAKEN BY THE MAJORITY OF FEDERAL CONTRACTORS TO RECRUIT, EMPLOY, AND PROMOTE QUALIFIED BLACKS AND MINORITIES. MOREOVER, THOSE WHO ARE WILLING TO VOLUNTARILY UNDERTAKE SUCH PROGRAMS NEED GUIDANCE AS TO HOW THEY CAN BEST ACHIEVE THE INTENDED RESULTS; AND A COMPREHENSIBLE STANDARD FOR MEASURING PROGRESS. GOALS, TIMETABLES, AND SPECIFIC ACTION PROGRAMS, DESIGNED TO ACHIEVE THE STATED GOALS WITHIN THE TIMETABLE STATED, PROVIDE WELL-INTENDING CONTRACTORS WITH SUCH GUIDANCE. THEY ALSO PROVIDE CONTRACTORS AND THE GOVERNMENT WITH AN ADEQUATE MEANS FOR MEASURING PROGRESS TOWARD ELIMINATING DISCRIMINATION.

WITHOUT GOALS, TIMETABLES AND SPECIFIC ACTION PROGRAMS, THERE IS NO REVIEWABLE STANDARD FOR DETERMINING WHETHER A CONTRACTOR HAS USED "GOOD FAITH" EFFORTS TO IMPLEMENT HIS OR HER PLAN. THEREFORE, AN AAP

THAT HAS NO GOALS, TIMETABLES AND SPECIFIC ACTION PLAN IS NOT "FEASIBLE". EFFECTIVE ENFORCEMENT OF THE ORDER AND ITS IMPLEMENTING REGULATIONS NECESSITATE THE USE OF THE SAME.

IT IS WORTH NOTING THAT GOALS AND TIMETABLES ARE ROUTINELY USED BY THE FEDERAL GOVERNMENT TO MEASURE PROGRESS TOWARD ELIMINATING EVILS IN OTHER CONTEXTS. IN THE FIELDS OF HEALTH, CONSUMER AFFAIRS AND ENVIRONMENTAL LAW, FOR EXAMPLE, GOVERNMENT REGULATIONS REQUIRE THE REGULATEE TO ADOPT AAP'S OF A PREVENTATIVE NATURE, WHICH INCLUDE GOALS AND TIMETABLES. THE USE OF GOALS AND TIMETABLES TO REMEDY ILLS IN THESE FIELDS HAS NEVER BEEN CHALLENGED. WHEN USED TO MILITATE THE EFFECTS OF HUNDREDS OF YEARS OF INVIDIOUS DISCRIMINATION IN THE PUBLIC WORKFORCE, HOWEVER, GOALS AND TIMETABLES BECOME OBJECTIONABLE TO SOME WHO FEEL THAT THEY ARE DISADVANTAGED BY THE SAME. I SUBMIT THAT OBJECTIONS TO THE USE OF GOALS AND TIMETABLES TO MEASURE PROGRESS TO ELIMINATE DISCRIMINATION FROM THE PUBLIC WORK FORCE ARE, IN FACT, OBJECTIONS TO PROVIDING ANY REMEDY TO THIS MALADY, AND MUST BE GIVEN SHORT SHIFT.

SANCTIONS AND REMEDIES

THE McCLOSKEY PROPOSAL TO LIMIT THE SANCTIONS FOR VIOLATION OF THE ORDER TO CANCELLATION OR TERMINATION OF A CONTRACT, OR DEBARMENT OF A CONTRACTOR FROM ENTERING INTO FURTHER GOVERNMENT CONTRACTS. THIS PROPOSAL IS INADEQUATE AND INCONSISTENT WITH THE SPIRIT OF THE ORDER.

IT MUST BE KEPT IN MIND THAT 11246 IS REMEDIAL. IT IS A PART OF THE COUNTRY'S OVERALL COMMITMENT TO TAKING REASONABLE STEPS TO ERADICATE

EMPLOYMENT DISCRIMINATION--TO ENSURE ALL PERSONS FULL AND EQUAL OPPORTUNITY IN THE EMPLOYMENT SPHERE; AND TO "MAKE WHOLE" THE VICTIMS OF SYSTEMATIC, INVIDIOUS DISCRIMINATION.

CONSISTENT WITH THIS POLICY, COURTS HAVE ROUTINELY HELD THAT WHERE A FEDERAL CONTRACTOR DISCRIMINATES AGAINST AN EMPLOYEE OR JOB APPLICANT ON THE BASIS OF THAT PERSON'S RACE OR SEX, ABSENT CONGRESSIONAL LIMITATION, THERE IS AN IMPLIED RIGHT IN THE ENFORCING AGENCY FOR IT TO SEEK ANY REMEDY TO EFFECTUATE THE PURPOSE OF THE ORDER, INCLUDING BOTH INJUNCTIVE AND RESTITUTIONAL RELIEF, E.G., BACK PAY. UNITED STATES V. DUNQUESNE LIGHT CO., 423 F.SUPP. 507 (W.D. PA. 1976). SEE UNITED STATES V. LEE WAY MOTOR FREIGHT, INC., 625 F.2d 918, 946 (10th CIR. 1979) WHERE THE COURT GAVE FLEETING CONSIDERATION TO THIS QUESTION, THEN REMANDED THE CASE TO THE DISTRICT COURT WITH INSTRUCTIONS TO RESOLVE THE QUESTION OF EQUITABLE RELIEF IN ACCORDANCE WITH DUQUESNE, SUPRA., AND A FAIR LABOR STANDARDS ACT (FLSA) CASE IN WHICH THE SUPREME COURT STATED THAT BECAUSE OF THE EQUITABLE NATURE OF THE FLSA, A DISTRICT COURT HAS JURISDICTION TO ORDER BACK PAY WHERE AN EMPLOYEE HAS BEEN UNLAWFULLY DISCHARGED OR OTHERWISE DISCRIMINATED AGAINST.

THE PRESENT IMPLEMENTING REGULATIONS PROVIDE THAT CONTRACTORS MUST REMEDY THE EFFECTS OF THEIR PAST DISCRIMINATION BY PROVIDING "BACK PAY WHERE APPROPRIATE". 41 C.F.R. 60-2.I(b). THE SPECIFIC LANGUAGE AUTHORIZING "BACK PAY" WAS NOT ADDED TO THE REGULATIONS UNTIL 1977. IT WAS THEN ADDED BECAUSE "BACK PAY" WAS RECOGNIZED AS AN INTEGRAL PART OF THE "MAKE WHOLE" POLICY OF THE GOVERNMENT. MOREOVER, THE AVAILABILITY OF RESTITUTIONARY RELIEF WAS BELIEVED TO BE A MAJOR INCENTIVE FOR FEDERAL CONTRACTORS TO PUT FORTH EARNEST EFFORTS TO ELIMINATE DISCRIMINATION

FROM THEIR LABOR FORCES.

BACK PAY AND SIMILAR RESTITUTIONARY RELIEF IS THE ONLY MEANS OF MAKING REPARATION TO THE INTENDED BENEFICIARIES OF THE ORDER. IT IS UNCONSCIONABLE THAT ONE WOULD PROPOSE TO ELIMINATE THE SAME AS A REMEDY FOR FAILURE TO COMPLY WITH THE ORDER. THE INEQUITIES OF SUCH A PROPOSAL BECOME CLEAR WHEN VIEWED IN ANOTHER CONTEXT.

SUPPOSE, FOR EXAMPLE, THAT MR."X", WHO IS DRIVING AT 75 MILES PER HOUR IN A 25 MILE ZONE, COLLIDES WITH MR."Y" AND CAUSES HIM TO BE INCAPACITATED FOR TEN MONTHS. NO ONE WOULD THINK IT UNJUST FOR MR."X" TO: (a) LOSE HIS DRIVERS LICENSE; (b) PAY THE VICTIM'S MEDICAL BILLS; and (c) COMPENSATE MR."Y" FOR TIME LOST FROM THE JOB AS THE DIRECT RESULT OF HIS WRONG DOING. ALL THREE STEPS ARE NECESSARY TO PUNISH THE WRONGDOER AND MAKE WHOLE THE VICTIM.

THIS IS THE SAME PRINCIPLE UPON WHICH THE BACK PAY PROVISIONS OF THE IMPLEMENTING REGULATIONS ARE BASED. SUSPENDING OR CANCELLING A FEDERAL CONTRACT MERELY PUNISHES THE WRONGDOER AND FULFILLS THE GOVERNMENT'S CONSTITUTIONAL OBLIGATION NOT TO SUBSIDIZE EMPLOYMENT DISCRIMINATION. CASTILLO V. USERY, 14 FEP1240,1250 (N.D. CAL. 1976). IT DOES NOT MAKE WHOLE THE VICTIM. BACK PAY AND OTHER RESTITUTIONARY RELIEF DO MAKE WHOLE THE VICTIM, AND THEREFORE MUST CONTINUE AS A PART OF THE FEDERAL CONTRACT COMPLIANCE PROCESS.

THE DEPARTMENT OF LABOR PROPOSAL IS OBJECTIONABLE

THE DEPARTMENT OF LABOR'S PROPOSED REVISIONS OF THE OFCCP REGULATIONS ARE ALSO REPUGNANT. AMONG OTHER THINGS, THEY WOULD RAISE THE

THRESHOLDS FOR COVERAGE AND SUBMISSIONS OF AAP'S; AND RAISE THE THRESHOLD FOR THE REQUIREMENT OF FILING EEO-1 FORMS---UNDER THE GUISE OF REDUCING PAPER WORK AND REPORTING.

THE EFFECT OF THESE PROPOSALS IS TO DISMANTLE THE FEDERAL CONTRACT COMPLIANCE PROGRAM. THESE PROPOSALS WOULD EXEMPT 75% OF THE FEDERAL CONTRACTORS FROM THE AAP REQUIREMENT.[7] THERE IS NO RATIONAL BASIS FOR THE EXEMPTION. THERE IS NO EVIDENCE WHICH SUGGESTS THAT EMPLOYMENT DISCRIMINATION IS MORE PERVASIVE IN THE WORK FORCE OF LARGE CONTRACTORS THAN SMALL ONES; NOR IS THERE EVIDENCE WHICH SUGGESTS THAT THE LARGER THE AMOUNT OF THE CONTRACT, THE GREATER THE DISCRIMINATION. THE GOVERNMENT'S OBLIGATION IS TO REFRAIN FROM USING PUBLIC FUNDS FOR ANY DISCRIMINATORY PURPOSE. CASTILLO V. USERY, SUPRA, 14 FEP AT 1250; NORWOOD V. HARRISON, 413 U.S. 355 (19 3). IT CANNOT AWARD A CONTRACT OF ANY SIZE TO ANY COMPANY WHICH DISCRIMINATES.

THE PRESENT 50 PERSON, $50,000 CONTRACT THRESHOLDS WERE NOT ARRIVED AT ARBITRARILY, BUT ARE BASED ON A PROJECTION OF WHAT THE GOVERNMENT CAN REASONABLY ENFORCE. NOW, UNDER THE GUISE OF REDUCING PAPER WORK, THE DOL PROPOSES TO EXEMPT 75% OF THE CONTRACTORS PRESENTLY COVERED. THE DEPARTMENT DOES NOT SUGGEST THAT IT IS IMPOSSIBLE TO ENFORCE THE ORDER AND ITS REGULATIONS AGAINST THOSE PRESENTLY COVERED. RATHER, IT SUGGESTS THAT PRESENT REGULATIONS ARE BURDENSOME AND COSTLY. THE COST AND BURDEN OF ENFORCING THIS ORDER MUST BE VIEWED IN PROPER CONTEXT, HOWEVER. THE ORDER IS, AFTER ALL, REMEDIAL IN NATURE; AND ALL REMEDIAL MEASURES INVOLVE SOME EXPENSE AND SOME BURDEN. MEASURES TO CLEAR UP THE AIR, THE WATER AND THE LIKE, ALL INVOLVE AN EXPENSE AND A BURDEN. THE SAME IS TRUE OF EFFORTS TO "CLEAN UP" THE AMERICAN LABOR FORCE. IN EACH CASE, THE OBJECTIVE IS TO TAKE POSITIVE STEPS TO RECTIFY THE SITUATION, AS SWIFTLY AND THOROUGHLY AS POSSIBLE, FOR AS FEW DOLLARS AS POSSIBLE, AND CAUSING AS LITTLE INCONVENIENCE TO THE INNOCENT AS POSSIBLE. THE PRESENT AAP REQUIREMENT DOES JUST THIS. NO LESS WOULD BE ADEQUATE, FOR WITHOUT WRITTEN AAP'S FROM ALL GOVERNMENT CONTRACTORS AS IS PRACTICABLE (50 OR MORE EMPLOYEES/$50,000 CONTRACT) THERE IS NO ADEQUATE MEANS TO MONITOR COMPLIANCE. NOR IS THERE ANY VIABLE MEANS FOR THE CONTRACTOR TO ASSESS HIS OR HER OWN PERFORMANCE.

IT IS IMPORTANT NOT TO EXEMPT ANY MORE CONTRACTORS FOR ANOTHER REASON. THE AAP REQUIREMENT HAS AN IMPORTANT DETERRENT EFFECT. IT DISCOURAGES VIOLATIONS OF THE LAW, THEREBY REDUCING LITIGATION AND CONTRACT CANCELLATION OR TERMINATION, AND FOSTERING A CLIMATE WHICH IS CONSISTENT WITH THE ACT.

WE ARE SENSITIVE TO THE NEED FOR A REDUCTION OF PAPERWORK AND ADMINISTRATIVE RED TAPE, WE DO NOT OPPOSE THE CREATION OF A MODIFIED AAP OR STREAMLINING SOME ASPECTS FOR SMALLER CONTRACTORS. BUT, AS A VERY MINIMUM, TO BE ACCEPTABLE, THE AAP'S MUST CONTAIN PRESENT UTILIZATION OF BLACKS, HISPANICS AND WOMEN, AND GOALS AND TIMETABLES FOR INCREASING THE SAME. THE COMPLIANCE REVIEWS MUST AT LEAST BE ANNUAL. WE REJECT THE DEPARTMENT'S PROPOSED 5-YEAR EXEMPTION.

CONCLUSION

EQUAL EMPLOYMENT OPPORTUNITY IS NOT YET A REALITY FOR MILLIONS OF BLACK AMERICANS. UNTIL EQUAL EMPLOYMENT IS ACHIEVED, THERE REMAINS A CONTINUING NEED FOR AGGRESSIVE ENFORCEMENT OF EXECUTIVE ORDER 11246 AS AMENDED. THE GOVERNMENT MUST REMAIN IN THE VANGUARD OF ENFORCEMENT EFFORTS, AS IT HAS DURING THE PAST FORTY YEARS. BUT THE ORDER MUST BE AMENDED SO THAT THE INTENDED BENEFICIARIES CAN ASSIST IN THE ENFORCEMENT EFFORTS VIA A PRIVATE RIGHT OF ACTION AGAINST THE CONTRACTOR.

FOOTNOTES

1. 41 C.F.R. § 6-1.40.

2. Under the current enforcement regulations, employees are required to conduct a self-analysis to determine whether blacks, Hispanics, and women are underutilized in their workforce and to use such analysis for dismantling the discriminatory process which resulted in the underutilization.

3. The "Philadelphia Plan" required bidders on any federal or federally assisted construction contract for projects in a five-county area around Philadelphia, to submit an acceptable affirmative action plan which includes specific goals and timetables for the utilization of black and "minority" manpower in six skilled crafts.

4. *But see*, *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443U.S.193 (1979), where the Supreme Court upheld the use of voluntary, race-conscious affirmative action plans designed to eliminate traditional patterns of conspicuous racial segregation.

5. These figures were gained from the OFCC, July 25, 1981.

6. On June 25, 1941, President Roosevelt issued the first Executive Order proscribing discrimination by federal contractors (defense contractors). Eight subsequent Presidents have supported and refined the Executive effort to achieve parity in the federal work force.

7. Under current regulations, contractors having 50 or more employees and a contract of $50,000 or more must develop and implement an AAP. The DOL proposes to raise the levels to 100 or more employees, and $1 million in federal contracts.

The CHAIRMAN. Our next witness will be Mr. James I. Nixon, vice president of ITT from New York, N.Y.

Mr. Nixon, we are very grateful to have you appear. We always enjoy meeting with you and getting better acquainted. We look forward to your testimony.

STATEMENT OF JAMES I. NIXON, VICE PRESIDENT, ITT, NEW YORK, N.Y.

Mr. NIXON. Thank you, Senator.

Senator Hatch, I would first like to say thank you for the opportunity to address you and the panel on this subject which is of vital interest to me both from a personal and a professional perspective. In addition to my position with ITT, which gives me responsibility for equal opportunity operations for the company, I am also chairman of the Equal Employment Advisory Council and immediate past chairman of the National Urban Affairs Council, a couple of other organizations which have interests similar to my corporate responsibilities. I mention that so that my comments will be taken in the perspective of a general overview of this activity. I do not expect to get into a lot of detail unless you want to talk about such in specific questions.

The CHAIRMAN. That will be fine. We will be happy to have you submit anything in writing that you would care to make in detailed form. We will be happy to place it in the record. We certainly will place your full statement in the record following your oral presentation.

Mr. NIXON. Thank you.

My comments will be basically general, but we can get to specifics.

The broad effort which we have been referring to here as our Nation's affirmative action program should be, I think, the embodiment of our basic principles of equality of opportunity in employment and our collective commitment to taking those steps necessary to assure the translation of principle into practice as it affects all citizens. I think that that is the thing that most of the speakers preceding me have basically been saying. It is certainly my position.

Thus, there is a continuing need for the program both as a powerful symbol of a national principle, but also as a potentially effective mechanism for integrating the efforts of a large sector of our economy, the Government contractors, toward attainment of the goal of translating that principle into day-to-day practice.

The success of such programs, I feel, has been fairly well demonstrated over the last 14-year period. I will throw in a couple of statistics here if it is not heresay.

The CHAIRMAN. That would be fine.

Mr. NIXON. It is the language of the business, so to speak.

I just took a selected few. First of all, the employment of minorities as officials and managers—that is one of the nine categories with the most widely available data—over the 14-year period from 1966 to 1979 improved from 1.9 percent to 7.2 percent, over a 250-percent increase.

The comparable figures for women were 9.4 percent to 18.1 percent, almost a 100-percent improvement.

For minority salesworkers, the figure increased from 4.4 percent to 11.9 percent, or about a 150-percent improvement.

For female technicians, the figure went from 20.9 percent to 39.3 percent, again almost a 100-percent gain.

I certainly would not expect anyone to think that those were necessarily barn-burning numbers, but on the other hand they do indicate, I think, there has been steady improvement, not as much as some would like but certainly a lot more improvement than many expected 10 to 14 years ago.

These categories, incidentally, were selected because they were some of those which contractors historically have found the most challenging for meeting affirmative action goals.

The point to be made is not that affirmative action programs are perfect, nor that the goal has been achieved. Rather, it must be recognized that a decade and a half of experience has brought about what I consider some rather positive results.

However, in that same decade and a half, there has been a gradual shift in the focus and orientation of the program such that inefficiencies now sap much of the potential strength of the national affirmative action effort. Such inefficiencies range from relatively minor philosophical shortcomings to significant operational policy differences. For instance, there has been a bureaucratic inability to see that a mandated statement from all contractors which says in every recruitment ad "We are an equal opportunity employer for minorities and females" renders that pronouncement virtually useless precisely because it has been mandated. This means that I, as a minority, cannot read that notice and necessarily take it seriously.

With respect to significant operational policy differences, I would cite, for example, the bureaucratic assumption—which has been mentioned by others testifying here—that contractors generally discriminate more or less willfully and knowingly. Of course, when you have that assumption, what results usually is an adversarial relationship and a punitive approach in a task which really should be undertaken—I would say must be undertaken to be effective—in a spirit of mutual cooperation and a commonality of objectives.

As a result, my criticisms of the present program fall into roughly the following categories.

First of all, the present enforcement effort, it seems, relies heavily on extremely detailed procedures, instructions, and statistical analyses. That has been talked about before. However, it also relies on an OFCCP self-monitoring system. By that, I am referring to the headcount that Ms. Simmons referred to: the number of contractors debarred, the number of show causes issued, the amount of back pay extracted, and so forth, which we in my corner of the profession refer to as the dead body count. That is the self-monitoring system that the agency uses. As such, it tends to reinforce the adversarial or punitive image that I mentioned before.

Furthermore, the program presently lacks a scorekeeping mechanism which would encourage both the Government and the contractor not so much to count the dead bodies but rather to count the live bodies, or, in other words, to focus on short- and long-range efforts to develop and/or open up job opportunities for females, minorities, or handicapped individuals by novel recruitment programs or internal upward mobility efforts such as those referred to earlier by Dr. Hansen of Purdue.

In fact, while the present program was designed to accomplish the purpose of looking at these longer and short range novel programs, the program almost achieves precisely the opposite effect by encouraging the contractor and the government to focus on analytic procedures and detail which is enhanced by what I call creative journalism.

The next point is that the data presently available to the OFCCP—I am referring not only to the most readily available and widely circulated, the EEO-1 forms mentioned by Mr. Hammond of Dow, but also the OFCCP presumably has available to it prior years' affirmative action plans for all of those contractors whose facilities were reviewed—are apparently not used to identify contractors which are in the greatest need of audit or review.

Rather, the selection process appears to contain an amalgam of criteria which are perhaps not even as good as pure random selection might be. Apparently, for instance, major target selection factors include such things as the prior personal relationship between the facility and the compliance officer, the relative desirability of the geographic location of the facility, or broad generalizations about the industry of which the facility is a part, just to name a few.

As a result, the limited resources of the Government are often inefficiently used to cover some contractors frequently—we have heard other testimony giving specific figures along that line—but more important to me, that means that many contractors are virtually not reviewed at all. All of that is done without any apparent specific regard to either the frequently reviewed or the unreviewed contractor's EEO track record.

This inefficiency of coverage is further exacerbated by the overlapping jurisdiction and efforts of OFCCP and EEOC. For instance, when OFCCP officers become bogged down in the investigation and resolution of individual complaints, which we find is often the case when they get involved in, the result is not only a much prolonged and generally no more effective review of the systemic program of the individual contractor, but it also results in significantly less time and resources available to review other contractors.

In addition, this frequently results in a situation where skills and philosophies which were developed for the OFCCP's prospective mission are possibly inappropriately applied to the solution of retrospective problems, a task which many of us feel is more appropriately and more effectively carried out by the EEOC.

The bottom line of this is that significantly fewer contractors can be reviewed and counseled by the limited resources of the OFCCP, resulting in a program which is less effective, and I think considerably so, than it could be.

In sum, the Nation's affirmative action program, I feel, can be characterized as demonstrably effective, based on the numbers I gave before and much other criteria which I think can also be used to demonstrate the same effect. I feel the program is certainly necessary.

However, I think it is in need of a refocus which will help all parties involved—the Government, the contractors, the advocacy groups, everyone—back off a bit, if you will, from the heavy focus on the analytic, which I feel does tend to get us bogged down in unproductive paperwork. Rather, a refocus is needed so that there is encouragement for the development and implementation of novel programs which are designed to increase the availability of people with the skills and qualifications for jobs at all levels, which is not to argue against Ms. Simmons' point that there are lots of people who presently have the skills.

A second point is to decrease the present focus on analytic detail, as I have mentioned and, third, to minimize the duplication of effort by at least these two key agencies so that the Government can improve its efforts to encourage employer programs which are future oriented in addition to the efforts ongoing to stamp out the vestiges of existing past discrimination.

The CHAIRMAN. We have great respect for your abilities in this area.

Are you of the opinion though that coverage of Government contractors by title VII is not enough and that they should also be covered by Executive Order 11246, or do you think there is a distinct and separate need for each agency?

Mr. NIXON. I think there is a distinct and separate need for each agency. I would emphasize a distinct and separate need for each agency. I think title VII is aimed at identifying discriminatory practices and discrimination as it is practiced against individuals that is illegal. It deals with righting that.

However, I think as title VII is structured, or certainly as I understand it, it does not actually aim at the sort of thing that affirmative action under 11246 was designed to get at. That is, to look forward and ask where are we, whether or not we have been discriminating to have brought us to where we are, look forward to where we think we should be with respect to the employment of people of different races, sex, and so forth, then devise for each contractor, each facility, a specific program to move from where we are to where we feel we should go. That, to me, is very distinctly different than what is mandated under title VII.

The CHAIRMAN. Thank you, Mr. Nixon. We appreciate having your testimony here today.

[The prepared statement of Mr. Nixon follows:]

J.I. NIXON TESTIMONY
AT AFFIRMATIVE ACTION HEARINGS
BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE

July 30, 1981

The broad effort which is referred to here as our nation's affirmative action program should be the embodiment of our basic principles of equality of opportunity in employment and our collective commitment to taking those steps necessary to assure the translation of principle into practice as it affects all citizens. Thus, there is a continuing need for the program both as a powerful symbol of a national principle, but also as a potentially effective mechanism for integrating the efforts of a large sector of our economy -- government contractors -- toward attainment of the goal of translating the principle into day-to-day practice. The success of such programs has been demonstrated over the last fourteen years by such figures as:

- Employment of minorities as Officials and Managers has increased from 1.9% in 1966 to 7.2% in 1979 (an improvement of over 250%)

- Comparable figures for women as Officials and Managers: 9.4% in 1966 to 18.1% in 1979 (almost 100% improvement)

- Minority Salesworkers increased from 4.4% to 11.9% in the same period (over 150% improvement)

-Female Technicians increased from 20.7% to 39.3% in the period (again, almost 100% gain in participation)

The above few categories were selected because they were generally some of the most challenging for many employers; gains in other categories were generally equally impressive. The point to be made is not that Affirmative Action Programs are perfect nor that the goal has been achieved; rather it must be recognized that a decade and a half of experience has brought about some very positive results!

However, that same decade and a half has seen a gradual shift in the focus and orientation of the program such that "inefficiencies" now sap much of the potential strength of the effort. Such inefficiencies range from relatively minor philosophical shortcomings (e.g. the bureaucratic inability to see that a mandated statement from all contractors that "we are an equal opportunity employer, M/F" renders such pronouncements virtually useless) to significant operational policy differences (e.g. the bureaucratic assumption that contractors generally discriminate willfully and knowingly; this usually results in an adversarial relationship and a punitive approach in a task which should be undertaken in a spirit of mutual cooperation and commonality of objectives). Thus, criticisms of the present form of the national affirmative action program include the following:

- The present enforcement effort relies heavily on extremely detailed procedures, instructions, and statistical analyses and an OFCCP self-monitoring system (number of contractors debarred, show causes issued, back pay extracted, etc.) which reinforces the adversarial/punitive image of the program.

-Further, the program presently lacks a score-keeping mechanism which would encourage both the government and the contractor to focus on short and long range efforts to develop and/or open up job opportunities for females, minorities, or handicapped individuals by novel recruitment programs and/or internal upward mobility efforts. In fact, while intended to accomplish this purpose, the present program tends toward precisely the opposite effect encouraging both the contractor and the government to focus on analytic procedures and detail enhanced by "creative journalism."

- The data presently available to OFCCP (e.g. EEO-1 forms and prior years' AAPs) are apparently not used to identify those contractors which are in the greatest need of audit/review. Rather, the selection process appears to contain an amalgam of criteria which are perhaps not even as good as pure random selection might be. Apparently, major "target selection" factors include, for instance, the prior personal relationship between the facility and the compliance officer, the relative desirability of the geographic location of the facility, and broad generalizations about the industry of which the facility is a part (to name a few). As a result, the limited resources of the government are often inefficiently used to cover some contractors frequently and others virtually not at all, without much regard for the contractor's EEO track record.

- This inefficiency of coverage is further exacerbated by the overlapping jurisdiction and efforts of OFCCP and EEOC. For instance, when OFCCP officers become bogged down in the investigation and resolution of individual complaints the result is not only a much prolonged -- though no more effective -- systemic review of that specific contractors AAP, but it also results in significantly less time/resources available to review other contractors. In addition, this frequently results in a situation where skills and philosophies which were developed for the OFCCP's "prospective" mission are inappropriately applied to the solution of restrospective problems--a task which is more appropriately that of EEOC. The bottom line is that significantly fewer contractors can be reviewed and counselled by the limited resources of OFCCP, resulting in a program which is less effective than it could be.

In sum, the nation's affirmative action program can be characterized as demonstrably effective and certainly necessary, but in need of a re-focus which will:

- Encourage the development and implementation of novel programs to increase the availability of people with the skills and qualifications for jobs at all levels.

- Decrease the present focus on analytic detail (with the resultant tendency to "analyse the problems away").

- Minimize duplication of effort by OFCCP and EEOC, to improve governmental efforts to encourage employer programs which are future-oriented.

Detailed proposals for implementing these revisions can be provided at a later date if the Committee so desires.

The **Chairman**. Our last witness here this morning will be Dr. Juan Trujillo, Equal Opportunity Administrator for Petro-Lewis in Denver, Colo.

Mr. Trujillo, we are very happy to have you here.

STATEMENT OF DR. JUAN TRUJILLO, EQUAL OPPORTUNITY ADMINISTRATOR, PETRO-LEWIS, DENVER, COLO.

Dr. **Trujillo**. Senator, let me apologize. Our president for internal operations was to be with us today. However, he is taking care of our business. We had a board of directors meeting today. He felt it important to remain at home. He of course sends his regards.

Senator, today I would like to speak to you specifically about our relationship with OFCCP.

The **Chairman**. Mr. Trujillo, I must apologize to you. I have another committee meeting at the same time. I need to make it down there. I am going to listen for about 5 minutes and then have Mr. Florez finish up your testimony. It is important that we get this record made today.

Dr. **Trujillo**. Much of what you have heard so far has been with regard to the adversary relationship which is the most single and fundamental problem we have had with OFCCP.

Second is their inability to respond to our inquiries with regard to the data that they utilized in order to arrive at what we call conclusions that are rather libelous for the corporation.

Petro-Lewis is a fairly young organization. We are about 12 years old. We are dynamic. We are growing at a very impressive rate. However, because of the relationships that we have developed with OFCCP, we can cite that the compliance review and the approach that was taken in the compliance review has done damage to our ongoing equal employment and affirmative action programs at Petro-Lewis.

The letter of findings, as far as we are concerned, is one that is groundless. It has no data base. They are reluctant to share with us their particular methodologies in regard to how they arrive at conclusions.

I can go on with recommendations, but as I told your staff, I will submit a paper very shortly detailing the types of changes that we think should happen.

The **Chairman**. Thank you so much.

Your paper will be entered into the record without objection following your oral presentation.

Dr. **Trujillo**. Petro-Lewis is basically an oil and gas company with our headquarters in Denver, Colo.

The **Chairman**. If I could ask you one question before I have to leave, I notice in the letter of findings that OFCCP sent you on January 22, 1981, regarding their compliance review of Petro-Lewis that they require you to "remedy them or present opposing facts and evidence within 15 days cf your receipt of this letter."

They also called for: "Your commitments must be detailed in a written conciliation agreement with this office."

How did you respond when it appears that they make conclusive statements but do not define the data used or their rationale used in their findings?

Dr. **Trujillo**. Senator, that is exactly our point. They have not provided us with the background information in order that we can review it, analyze it, and conclude in our way as to whether or not there are deficiencies.

The **Chairman**. You really did not know what they were referring to?

Dr. **Trujillo**. We know what they are referring to. We know they are referring to their regulations. That is for sure. However, we do not know what data they used to arrive at that conclusion, or allegation, with regard to our corporation.

The **Chairman**. That must be frustrating to you as affirmative action officer.

Dr. **Trujillo**. I think it is even more frustrating for my president because he believes in all we have been doing since 1975 when we submitted our first affirmative action plan to the Department of the Interior. Apparently, there has been some confusion in regard to whether or not OFCCP reviewed their inherited file from the Department of the Interior in regard to Petro-Lewis.

The **Chairman**. How did you respond to this request?

Dr. **Trujillo**. We have essentially responded in attempting to review our affirmative action plan in that we have developed a plan that fits the basic requirements for an affirmative action plan given OFCCP regulations. We are yet waiting for some type of confirmation or further remarks in regard to what may be deficient, et cetera. We have been waiting for those remarks since April 1981.

The **Chairman**. Thank you, Mr. Trujillo.

We will make your statement a part of the record.

[Material to be supplied follows:]

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS
DENVER AREA OFFICE
BUILDING 67, DENVER FEDERAL CENTER
Denver, Colorado 80225
303-234-2154

DDEN-052

JAN 23 1981

RECEIVED
JAN 26 1981 9
PETRO-LEWIS CORP.

Mr. Jerome Lewis
President
Petro-Lewis Corporation
P. O. Box 2250
Denver, CO 80201

Dear Mr. Lewis:

On July 29, 1980, we concluded our review of your company's equal employment opportunity policies and practices. The findings reflect that Petro-Lewis Corporation is not in compliance with the requirements of Executive Order 11246, as amended, and its implementing regulations.

The deficiencies noted during the review are listed in the enclosure. You are required to remedy them, or present opposing facts and evidence within 15 days of your receipt of this letter. The principles for corrective action to remedy these deficiencies are also outlined in the enclosure. Your commitments must be detailed in a written conciliation agreement with this office.

It is our sincere desire to assist you in resolving these issues. It is therefore suggested that you telephone Mr. Robert Ross or Mr. Robert Flores at 234-2154, to arrange a meeting to conciliate a resolution of these deficiencies.

Sincerely,

Dennis J. Santistevan
DENNIS J. SANTISTEVAN
Denver Area Office Director
Office of Federal Contract Compliance
Programs/ESA

Enclosure

Enclosure to letter dated JAN 22 1981

Petro-Lewis Corporation
P. O. Box 2250
Denver, CO 80201

Deficiencies and Corrective Action Necessary to Achieve Compliance

1. Deficiency. The contractor's revised AAP covering the period July 1980 through July 1981, contains deficiencies which cause this document as presented to be in noncompliance with the requirements found at 41 CFR 60-2.

Corrective Action. The contractor must revise each of the following AAP related deficiencies in a manner consistent with the appropriate Sections of 41 CFR 60-2.

2. Deficiency.

Workforce Analysis - 41 CFR 60-2.11

Lines of progression in some major departments are not identified. An example of this deficiency is evident in department 116 which fails to identify by supervisory and subordinate job titles, the three sub units of administration, acquisition land, and property economics. Also, many examples exist indicating job titles are not ranked from highest to lowest paid, thus, lines of progression are not identified.

Corrective Action. The workforce analysis must be revised in compliance with 41 CFR 60-2.11(a). Thus, all work units within each major department having a supervisory title and related subordinate workforce must be listed separately. Lines of progression within all departments and/or work units must be defined by order of wage rates, or salary ranges.

3. Deficiency.

Utilization Analysis - 41 CFR 60-2.11(b)

(3A) Job Groups: As established the job groups are unacceptable because many job groups contain job titles which fail to meet the criteria of job grouping outlined in the above cited regulation: "...one or a group of jobs having similar content, wage rates and opportunities." This deficiency exists in 13 of 19 job groups. The most obvious examples involve the mixing of supervisory job titles with their nonsupervisory subordinates. Additionally, some job groups are too small numerically to provide meaningful statistical significance.

(3B) Availability Analysis: As presented the availability analysis is unacceptable because it is based on unacceptable job groups. Further, many job groups fail to reflect evidence that female and minority availability in feeder job groups were considered when computing the availability. Also, the "eight-factor" analysis as applied, fails to meet the requirements of 41 CFR 60-2.11(b)(1) & (2) in regard to the information evaluated and the factoring methods used in arriving at your final availability figures.

Corrective Action. Revised job groups must include the grouping of job titles which are similar in job content, wage rate, and opportunity. Additional care should be taken to insure that job groups have significant numbers of incumbents.

When establishing final availability estimates of minority and female candidates for specific job groups, the principles of an "eight-factor" analysis as set forth in the regulations cited above must be considered.

4. Deficiency.

Identification of Problem Areas - 41 CFR 60-2.13(d)

This section of your AAP fails to identify concentrations and/or underutilization of females and minorities within specific job groups, departments, sub units, or job titles.

Corrective Action. The AAP must identify problem areas (deficiencies) by organizational units and job groups. Examples of how this section of your AAP may be addressed are provided in detail at 41 CFR 60-2.23(a) and (b).

5. Deficiency.

Establishment of Goals and Timetables - 41 CFR 60-2.12

Projected annual and ultimate goals and timetables fail to comply with the regulation cited above. Specific deficiencies are:

(5A) Annual vacancy projections fail to distinguish those filled by promotion from those filled by hires.

(5B) Projected 1980-81 AAP year hires and/or promotions of females and minorities are stated as numerical goals only. They fail to indicate annual percentage rates.

(5C) Total projections for 1980-81 are not commensurate with vacancies filled during the 1979 review period. An example of this disparity is seen in the 16 vacancies projected for this AAP year as compared to the 553 filled during 1979.

(5D) Ultimate goals are unacceptable because they fail to indicate for each job group currently underutilized with females and/or minorities; the percent and specific timeframe ultimately sought.

Corrective Action. Annual and ultimate goals and timetables must include the following: (1) total anticipated vacancies to be filled by new hire or promotion; (2) numeric and percentage goals assigned to minorities and females which as a minimum should reflect their established availability in job groups of which they are currently underutilized; (3) projected vacancies must take into consideration your expansion, contraction, and workforce turnover; (4) Ultimate goals for each job group in which the percentage figures arrived at through availability studies will not be achieved during this AAP year must be established. These long range commitments must be stated as percentages and must be accompanied by the year projected for attainment.

6. Deficiency.

Wage Disparities - 41 CFR 60-2.13(f)(g)

We have completed our analysis of all data received during our desk audit and on-site review of personnel transactions and related disposition. It has been determined from this research that females and minorities are experiencing disparate pay treatment. Evidence leading to this conclusion is confirmed through our research of salary information provided during our review. Your records reveal evidence of systemic discriminatory practices and procedures which have and continue to cause adverse economic impact against females and minorities. The pattern and practices are initiated at the time of hire, and are perpetuated throughout the career path of many of your employees. Our research indicates concentrations of females and minorities in lowest paying nonexempt and exempt positions, and nonminorities are concentrated in highest pay grades within the above pay categories. Comparison of females and minorities against males and nonminorities in pay grades 23-35 (approximately 73% of the total workforce), reveals females average $96 or 6.5% less per month than nonminorities. Salary analysis by pay grade revealed 6 of 13 pay grades in which females average an aggregate difference of $246 or 15.7% less per month than males in comparable pay grades; while minorities were found experiencing an aggregate monthly difference in 7 of 13 pay grades of $96 or 6.5% less than nonminorities in comparable pay grades. Minority males and females were found experiencing lower entry and current pay grades and rates of pay than nonminority males and females who entered your workforce with equal or less education and related work experience. An analysis of seniority vs. salary treatment reveals evidence of pay grades having female and minority concentrations along with lower rates of pay, who also average more seniority than their male and nonminority counterparts in comparable pay grades. Interviews with company officials confirmed that Petro-Lewis Corporation has not and does not monitor salary and other pay related issues for EEO purposes.

Corrective Action. Commitments to develope and implement salary related plans to identify and correct all policies, practices and procedures responsible for minority and female disparate pay treatment must be included in the revised AAP. Further, where applicable, persons identified by OFCCP as sustaining economic injury resulting from past and current discriminatory pay treatment will be included in any conciliated resolution of this issue.

7. Deficiency.

Affected Class - 41 CFR 60-2.1(b)

Based on the total research relative to minority and female concentrations within the Petro-Lewis workforce, we have concluded an "affected class: of females and minorities exist at your Denver headquarters. By definition, an affected class is "... one or more employees, former employees, or applicants who have been denied employment opportunities or benefits because of discriminatory practices and/or policies by the contractor, its employees, or agents." Our analysis of all data reflective of personnel transactions prior to and during the review reveals evidence that females and minorities are currently suffering the effects of past and present systemic discrimination caused in part by the following:

(a) Unvalidated selection procedures
(b) Placement patterns based on race and sex at time of hire
(c) Pay grade and related salary assignments based on race and sex
(d) Disparate treatment relative to training, promotion, transfer, and terminations
(e) The contractor's failure to develope and implement written affirmative action programs for years 1976 through 1979
(f) The contractor's inability to demonstrate that issues determined responsible for "cause and effect" of the affected class, did not result from discrimination

The effect the above issues have on affected class members is basically economic, (i.e. their earnings are collectively less than males and nonminorities with similar or equal employment history).

Corrective Action. The contractor and OFCCP must resolve all issues surrounding the affected class and such resolve must be included in a conciliation agreement as specified in 41 CFR 60-2.1(b) and 60-60-6(a). Resolution of all affected class issues must include remedies which in part are designed to "make class members whole." Remedies designed to provide relief to class members include, but are not limited to:

1. Determination and restoration of economic loss, (backpay and/or front pay).
2. Opportunity to move forward as quickly as possible into positions and/or pay grades they would have held but for discrimination and/or failure to remedy it. ("Rightful place")
3. Opportunity to transfer, hire, or promote as vacancies occur.
4. Selection based on minimum qualifications of current incumbents.
5. The guarantee that all class members are fully aware of their rights under the remedial action agreement (including their right to back pay, and front pay, and of any conditions of such payments), and the procedures through which those rights will be affected, including counseling where appropriate.

8. Deficiency.

Handicapped and Veterans AAPs 41 CFR 60-741 and 60-250

The revised 1980-81 Handicapped and Veterans AAPs fail to meet the requirements of subject regulations. Specific deficiencies requiring corrective action are:

(a) The Handicapped AAP does not contain a commitment to provide invitations to employees and applicants to identify themselves with guarantees of confidentiality.

(b) The Handicapped AAP fails to contain the required policy statement endorsed by the company's CEO.

(c) The Veterans and Handicapped AAPs fail to contain commitments to make reasonable accommodations to the mental and physical limitations of qualified handicapped workers.

(d) The Veterans and Handicapped AAPs do not contain commitments to review all positions and related job requirements for mental and physical qualifications. Further, the method and timetable for completion of such review is not provided.

Corrective Action. The Handicapped and Veterans AAPs must be revised in a manner consistent with the regulations found at 41 CFR 60-741 and 60-250. The specific guidance required to address the deficiencies listed above are found at 41 CFR 60-250.6 and 41 CFR 60-741.6.

CUPA

December 7, 1981

The Honorable Orrin G. Hatch, Chariman
Committee on Labor and Human Resources
4230 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman,

As President of the College and University Personnel Association (CUPA) I am pleased to offer the following testimony on behalf of the CUPA membership for inclusion in the record of your committee's oversight hearings on the activities of the Office of Federal Contract Compliance Programs.

For 35 years CUPA has been the major professional organization representing the nation's higher education personnel professionals. CUPA currently represents over 1100 institutions of higher education. Our members are located in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. CUPA's institutional representatives are responsible for most aspects of personnel administration at their institutions, including the development and implementation of equal employment opportunity and affirmative action programs.

CUPA has a long tradition of providing its membership with publications and educational programs on the nature of federal requirements vis-a-vis the affirmative action and equal employment responsibilities of those institutions that are federal contractors. CUPA's AA/EEO Council, which is comprised of member-volunteers with demonstrated expertise in the area, has consistently been a leader in promulgating and producing a number of timely publications and seminars concerning important new issues in the federal contract compliance area. It is important to note that despite the many serious concerns our members have with the federal government's contract compliance program, they remain firm in their commitment to the goal of equal employment opportunity. As one member stated recently:

> "Strong enforcement is absolutely necessary for progress. Those of us who are for strong enforcememt must take personal and professional stands against practices...that jeopardize or weaken this end. Some of the present practices do nothing except give opponents of affirmative action and equal opportunity the means to wreak havoc. Instead of fighting for progress we find ourselves fighting to hold on, and no wars are won by hanging on."

It is quite evident that the present compliance scheme is hampering, rather than promoting, the attainment of the goal of equal employment opportunity at least on the campuses of our nation's universities. This is a travesty when you consider that higher education is an incredibly labor intensive area with close to 85% of a typical institution's funds being earmarked for labor costs. We must free those funds from being wasted on unnecessary, duplicative, and inconsistent compliance activities as is presently required.

CUPA has actively participated in the comment process with regard to all aspects of governmental regulation of equal employment opportunity, and specifically with regard to the OFCCP's conduct. We have attached several items of correspondence on the OFCCP's conduct previously provided to this Committee and other government agencies. First, we have attached a survey of member institution's comments on criterions of OFCCP conduct taken by CUPA and The National Association of College and University Business Officers (NACUBO). This survey was provided to the Chairman of this Committee on August 18, 1981 and was also sent to Mrs. Evelyn Idleson at the Office of Interagency Coordination, EEOC. Second, we have also attached a letter of August 10, 1981 to the Chairman of this Committee from the American Council on Education on behalf of a number of organizations including CUPA. Third, we have attached a letter to Mr. James Cisco, the Acting Director of the Division of Programs Policy of the OFCCP of September 14, 1981 submitted by the American Council on Education, indicating other specific problems with the OFCCP. Finally, we have attached a letter of October 26, 1981 from CUPA to Mr. Cisco, outlining CUPA's further concerns with the OFCCP's proposed revisions to the present regulations on the affirmative action obligations of federal contracts.

OFCCP's involvement in the college and university setting, has been marked by rigid, bureaucratic insistence on a set of unrealistic standards and a lack of understanding of how the employment process functions in the collegial setting. First, training programs for OFCCP field personnel are totally inadequate for dealing with academia. In a speech at Syracuse University on April 24, 1980, the then Director of the OFCCP, Weldon Rogeau stated that the OFCCP had spent as much as 5% of its staff time training Equal Opportunity specialists as to the specialized needs of colleges and universities. This program was allegedly initiated after the transfer of government contract audits from the then Department of Health, Education and Welfare to the OFCCP in 1978. After filing two requests for information as to the nature of this training program, both of which were not responded to, we were dismayed to ultimately learn that the only training received by the OFCCP's field personnel who are responsible for colleges and universities is a review of the Code of Federal Regulations generally applicable to the OFCCP. They are, in fact, we learned given no specific training on the employment situation of colleges and universities. These field personnel not surprisingly then evidence a complete lack of understanding of employment in colleges and universities. Colleges and universities do not function in the same manner as a factory, where an individual can be trained for a specific job in a relatively short period of time. The OFCCP field personnel almost universally assume that any individual reflected in their statistics in a given job classification is capable of performing that job in the college and university setting. This is simply not true. Many positions in the academic world require long years of training and a commitment to academic excellence which, in the final analysis, relatively few individuals possess. OFCCP's insistence on unrealistic availability figures has badly skewed the recruitment and training process in the college and university setting.

We note that the OFCCP has recently acknowledged this deficiency in litigation in federal court, stating in a recent affadavit filed in Federal Court that a lack of experienced staff is one factor that has caused the OFCCP to have problems and limitations in conducting reviews of higher education institutions. In addition, the testimony further indicated that compliance investigations of employment practices in higher education institutions "are among the most complex."

I believe this sad state of affairs speaks for itself.

A further instance of the difficulties that OFCCP is imposing on colleges on universities is found in the confrontational method utilized by the OFCCP compliance officers. For the most part, field personnel arrive at the university for an onsight investigation which a fixed position that the university is guilty of discrimination by virtue of the fact that it is an employer. This confrontational approach results in OFCCP attempting to skew the numerical data based on unrealistically high availability figures in order to justify this previously determined conclusion of guilt. This is a completely inappropriate mechanism for resolving equal employment opportunity problems. It results in an expensive, burdensome, paper "shell game" whereby the OFCCP field personnel attempt to prove to the greatest extent possible that the university is guilty of a discrimination. These personnel do not make a realistic, impartial assessment of the university's EEO/Affirmative Action track record. They simply attempt to create a case of employment discrimination.

The government, however, is supposed to be an impartial enforcement agency charged with responsibility for fairly administering Executive Order 11246, not an institution solely concerned with as many back pay awards as possible and proving discrimination in every compliance review.

Yet another difficulty is illustrated in the history of the Format for the Development of an Affirmative Action Plan by Institutions of Higher Education. The Format was developed under the auspices of the OFCCP in 1975. However, since the 1978 consolidation of enforcement authority within the

OFCCP, a large number of the OFCCP field and national office staff have refused to adhere to the Format. In fact, despite assurances from the national office staff that the Format is still valid, a host of our members have complained that regional officials either are ignorant of the Format's existence or insist it has been eliminated. In fact, one member recently gave in to such pronouncements and spend what amounts to almost $50,000 in wasted funds to alter its computer program to conform to regional officials wishes. Such conduct by officials of the federal government in inexcusable. OFCCP regional officials are, thus, often conveying the message to college and university contractors that, "we won't tell you what type of affirmative action plan is acceptable to us and, in addition, you may not rely on the affirmative action plan Format which was developed specifically for you." Again, such conduct does not serve the public policy considerations of equal employment opportunity and affirmative action and turns the entire process into a bureaucratic game.

This "game" is even less amusing when you note that many compliance officers are not even aware that a special biannual reporting form EEO-6 exists for higher education institutions. This should be basic, elementary knowledge for any compliance officer involved with higher education.

We recognize and appreciate the recent efforts being made by many individuals, including yourself Mr. Chairman, to eliminate the waste, inconsistencies and duplication inherent in the present regulatory scheme for enforcing the affirmative action obligations of federal contractors. Our members wholeheartedly endorse the concept of affirmative action when necessary to redress past discriminatory practices but they agree that changes in the manner OFCCP currently enforces E.O. 11246 are necessary in order to make their affirmative action efforts truly meaningful.

OFCCP compliance officers must be trained regarding the nature and complexities of higher education. We stand ready as we have in the past to assist with such training.

Current regulations need revision so that greater emphasis is placed on the good faith efforts of federal contractors to review their employment practices and policies to ensure they are non-discriminatory. The regulations should also be revised so that the present emphasis on inflexible and often unrealistic numerical guidelines is replaced with more substantive meaningful criteria.

Confrontational techniques and inconsistent enforcement must be eliminated. Further, the OFCCP must be directed to cease seeking remedies which are not authorized by E.O. 11246, such as back pay.

CUPA supports the recent issuance of proposed regulations designed to reduce unnecessary paperwork to the extent those proposals go. However, these regulations do not come close to fully addressing the fundamental difficulties imposed on college and university contractors by the OFCCP.

We appreciate this opportunity to assist your committee in understanding the shortcomings of OFCCP's present enforcement efforts and the extent to which these shortcomings impact on the ability of colleges and universities to continue employing individuals who are qualified for their positions. It is our hope that you will not hesitate to call on us if we can help further as we continue in our attempts to maintain the high level of academic excellence that has made America the leader throughout the world in post-secondary education.

Sincerely,

John Clewis

John Clewis

CUPA
1981

Ms. Evelyn Idleson
Office of Interagency Coordination
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

Dear Ms. Idleson:

On behalf of the members of the College and University Personnel Association (CUPA) and the National Association of College and University Business Officers (NACUBO), we are pleased to submit to you the following data, both statistical and anecdotal, that detail many of the concerns our members have with the federal government's EEO paperwork and recordkeeping requirements.

Both CUPA and NACUBO seek to promote sound personnel and fiscal management in colleges and universities. An international network of some 3,000 personnel administrators, CUPA represents over 1,000 institutions. NACUBO represents approximately 2,000 colleges and universities.

It is our hope that by providing you with these data, the need for the government to modify higher education's present federal requirements will become clear. We feel that certain modifications are necessary to ensure that higher education institutions can achieve the vitally important and long-sought after goal of providing equal employment opportunities for all individuals.

The following data are separated into three parts:

I) Results of CUPA's membership survey on federal EEO paperwork and recordkeeping requirements;
II) Excerpts of comments received from NACUBO and CUPA members regarding federal EEO paperwork and recordkeeping requirements; and
III) Summary remarks and recommendations.

We are highly appreciative of the efforts of Barry Anderson, former Director of EEOC's Training and Investigation Division, who was of great aid to both associations in our efforts to collect data from our members. It was, in fact, Anderson who suggested we undertake our respective surveys. We are also very appreciative of being given the opportunity to submit these following data and hope you will not hesitate to call on us if we can be of further help.

Steven C. Hychka
Director of Management Programs
and Federal Focus
NACUBO

David Roots
Assistant Executive
Director/General Counsel
CUPA

Enclosure

I. The CUPA Survey

CUPA included a nine-question survey of federal EEO paperwork and recordkeeping requirements in two issues of its weekly newsletter, the Personnelite, which is sent to every member of the Association (copies are attached).

The questions asked of our members were loosely extracted from the industry-wide questionnaire used by the EEOC last year when it did its own survey on the subject of paperwork and recordkeeping requirements. Barry Anderson, former director of EEOC's Training and Investigation Division, counseled CUPA's staff regarding the questions that should be asked prior to their inclusion in the newsletter.

Tabulating the survey results was a long process as it had to be done by hand. In addition, some participants had to be contacted in order to reconcile their responses to some of the questions.

We believe the results are very useful and valid indicators of the feelings higher education personnel administrators and business officers have vis-a-vis federal paperwork and recordkeeping requirements.

II. Paperwork: Introduction to NACUBO Anecdotal Survey

In November 1980, after meeting with EEOC officials, the National Association of College and University Business Officers (NACUBO) conducted an informal survey--through its monthly newsmagazine--of the administrative burdens imposed on higher education by federal paperwork requirements, specifically in the area of antidiscrimination. The survey requested anecdotal, not statistical, information from college and university business officers; it specified no particular format, only that respondents describe what they perceived to be excessive paperwork burdens.

In all, NACUBO received 14 responses to the survey: eight directly from the news magazine request, and six through the NACUBO Personnel Committee, which is composed of business officers and personnel directors at colleges and universities of all sizes and types. Added to this number are six anecdotal responses sent to CUPA, which conducted a statistical survey (included in this report) on the same subject.

Below are excerpts from those responses. They have, in a few cases, been edited for the sake of clarity and to insure the confidentiality of the respondent. Predictably, the responses focus on duplication of federal equal employment opportunity paperwork requests, approval of affirmative action plans, reporting forms, and multiple agency complaint investigation.

On duplication of data requests:

"A final problem area--one of duplication--is the requirements for EEOC (EEO-6 forms) versus the required analyses for OFCCP. If the two could somehow be combined, with guidelines specific to colleges and universities, we could meet both the letter and spirit of the law, and the relationship between us and the agencies would be less adversarial. Currently, the demands on staff time and departmental. . . budgets, including computer time, are incredible due to duplication."

"To the extent that EEOC and/or OCR conduct investigations of their own, the university may be required to photocopy numerous records for each agency. In addition, faculty members may be required to repeatedly relate their experiences to a variety of federal investigators."

On compliance investigations:

"The Equal Employment Opportunity Commission (EEOC), the Office for Civil Rights and our local human rights commission all handle discrimination complaints. Each agency handles it differently. On occasion, a charge is filed with the EEOC and it starts the investigation, then the file is turned over to the local human rights commission to investigate, and it starts a new investigation from the beginning. Thus, the work a person did for the EEOC was wasted time."

"The real issue for us is the responsibility to more than one agency. Our recent compliance review was a terrible experience, although we were as prepared as we could have been. The requirements for job groups, analyses of various kinds, etc. were so different from the old OCR/HEW requirements that we had to revise all of our recordkeeping."

"In the area of individual complaints, for example, we still find duplicate (and even triplicate) investigations of single issues. Currently, our region office for civil rights is accepting and investigating employee complaints of discrimination, for example, which are identical to EEOC charges. HHS cites either Title VI of the Civil Rights Act or Title IX of the 1972 Education Amendments as the legal authority for such investigations. These are independent from EEOC investigations, requiring either different information responses or different reporting formats. Determinations are issued independently. The situation is further aggravated by investigations by the OFCCP. . . ."

"My university is currently in the position of being investigated by three federal agencies on the basis of one sex discrimination complaint. The complainant filed claims with EEOC, OCR, and OFCCP. OFCCP has commenced its investigation and EEOC was invited to participate in preliminary interviews, but EEOC declined and stated it would hold a fact-finding conference in approximately 30 to 60 days. Now, EEOC has decided to await the outcome of the OFCCP's investigation. I am afraid that if the OFCCP's investigation is favorable to the complainant, the EEOC will take no further action; however, if the OFCCP's decision is favorable to the university, the EEOC will commence an investigation of its own. OCR has also stated that it will await the outcome of the OFCCP investigation, but OCR has not indicated what it will do once that decision has been rendered."

On developing affirmative action plans:

"The EEOC publishes regulations concerning affirmative action plans, policies and procedures; the OFCCP publishes regulations concerning affirmative action plns, policies and procedures. Although both agencies are addressing the same issues, they appear to have different views."

"A brief history of the development of an approved AAP for this university might be helpful in illustrating some of the paperwork problems. A few years ago, the university was in what some people thought the final state of approval of the AAP, after several years of wrangling with OCR over job titles and job groups, utilization analyses, goals and timetables, etc.

"I came into an office that had (at minimum) 35 bound copies of three sets of earlier years attempts at AAP's, all presumed to be a final copy. The last complete set of seven volumes consisted of a conservative estimate of 1,500 pages!

"Needless to say, the volumes consisted of computer runs of 2 or 3 configurations; they even contained an entirely new set of "job titles" called composite job titles. All employees were forced into one of some twenty-eight such titles, which required new programs, much work by hand, and new methods of coding each position for a CJT. To my disbelief, the CJT's were not related to the utilization analysis or the determination of goals and timetables. They were a new way to display the work force profile unrelated to any other aspect of the AAP.

"The AAP was finally approved. Later, the university went through a pre-award compliance review. Thinking that we would need to provide a profile of the workforce in the CJT format, we dusted off the codings, ran the old programs, this time relating the CJT's to EEO-6 categories, only to find that the CJT's were not pertinent to the review. A conservative estimate of cost, just related to compiling the CJT's, is in the area of $5,000."

"Dealing with compliance agencies is one of the most frustrating aspects of my job. I find myself spending so much time funneling statistics to the compliance agencies that I have little time to devote to doing what I know must be done to make progress. As one Affirmative Action officer of a large midwestern university said at a recent meeting: 'After you have spent a lot of time, effort and sweat putting together a five inch affirmative action plan that meets federal requirements you still have not hired or promoted one minority or woman.' The point is completely incomprehensible to me. . ."

"The time spent in paperwork could better be used for promoting affirmative action and equal opportunity within the university."

On availability data:

"Without a doubt, the most burdensome problem is the cycle of paperwork started by unrealistic availability data. When a plan is established, the federal government requires setting goals based on availability data which are usually inadequate for a particular region and even misleading nationally in many cases. Goals for hiring women and minorities are set, usually for less than a five-year period, determined by comparing the availability data to the Institute work force. In addition, the availability data represent qualified females and minorities who are already working. For example, with minority faculty members being so small, a professor moving from one university to another only creates a problem for the university that lost the faculty member. Faculty goals are thus very difficult to meet, especially in fields such as science and engineering. Here is where the paperwork process begins. Documentation must occur to support why a particular goal was not achieved and new goals are re-established based on EEO pressure. The cycle builds."

On Form EEO-6, the Higher Education Staff Information Report:

"Because the EEO-6 report required of us differs from the EEO-1 report required of private industry, the investigators are geared to those job categories and titles and even refer to the EEO-1 report in the guidelines for preparing an affirmative action plan."

"More recently our problems have centered around the EEO-6 reports. We have found that it takes several days of concentrated effort to accurately complete the report and to assure that all edit checks are satisfied for the reporting of all categories of employees, grouped and regrouped by different criteria."

On OCR Title IX Compliance Reviews:

"My university received a letter from OCR notifying us of a review of the university's compliance with regulations implementing Title IX of the Education Amendments of 1972, as it relates to financial aid.

"The desk audit consisted of the university's submission of data which answered eighteen separate requests of the OCR. The following is a best estimate of the hours devoted to and the cost resulting from the compliance review:

	Hours Devoted	Direct Cost or Compensatory Time
Preparation		
Executive Officer	236.5	$5,043
Administrative/ Professionals/ Faculty	438.0	6,420
Clerical	182.0	1,028
Data Processing (282 computer runs)	15.7	3,144
Programming Purchases and Site Visitation Meetings	60.5	1,158
	932.7	$18,584

"The compliance review to which the university responded was an extensive and expensive proposition. The time frame for a response was terribly short considering the amount and complexity of the information requested. After asking the university to respond within 15 days, OCR took over a year to complete its review."

On OFCCP compliance reviews:

"Our first problem has to do with the inexperience of OFCCP with the records kept and needed by institutions of higher education. OFCCP is unfamiliar with the unique job titles, salary structures, and hiring problems of colleges and universities. It is also unfamiliar with limited budgets, travel, and support staff, all of which make the record keeping requirements and the response to audits difficult for us. In its investigation of specific complaints, the OFCCP staff were unprepared, I found, unknowledgeable, and demanding in its request for information from various department heads and staff. We were required to xerox large numbers of documents and to make available innumerable files prior to OFCCP's staff setting up an investigation plan. As a result, much of the material was unused and unnecessary staff time obligated and expense incurred."

"The complexity and inconsistency of the regulations have another adverse affect. Because investigators are poorly trained, at best, the application of these regulations too often becomes a matter of personal whim. Many investigators take opposition to a request personally or act as if their job depended upon finding something wrong with the institution regardless of the progress made. Recently an investigator from OFCCP requested that I set aside 2 1/2 days for an investigation of a complaint which should not have taken 2 1/2 hours, yet would not be persuaded otherwise, until he interviewed the supervisors of the complainant in my office. He did not ask one question which could not have been answered by the complainant."

On the attitude of the federal government in investigating anti-discrimination:

"The investigator is still convinced we acted in bad faith. In another instance an investigator who was investigating a failure to hire complaint by a minority complainant could not understand why we did not put her in the final pool after we found out she was a minority. In this case the records clearly showed that the division made extensive efforts to advertise where minorities were likely to be notified; minorities applied; the job requirements were job related and the job requirements were applied fairly to all applicants. From this and other similar experiences it is safe to say that almost all investigators suffer from the misapprehension that preferential treatment is good faith or vice versa."

III. Summary

The members of CUPA and NACUBO have serious concerns with the federal government's rules and regulations regarding EEO paperwork and recordkeeping. Despite these concerns, which we will briefly summarize below, our members fairly consistently point out that they feel a strong commitment to equal employment opportunity.

However, they are becoming increasingly frustrated because, as one member stated:

> "Strong enforcements is absolutely necessary for progress. Those of us who are for strong enforcement must take personal and professional stands against practices ... that jeopardize or weaken this end. Some of the present practices do nothing except give opponents of affirmative action and equal opportunity the means to wreak havoc. Instead of fighting for progress we find ourselves fighting to hold on, and no wars are won by hanging on."

No wars are won by hanging on, nor will the goal of equal employment opportunity be reached unless the resources of higher education institutions are freed from requirements that hamper achieving that goal.

In conclusion, our members have indicated:

- o Maintenance of data and records required by federal EEO statutes is much too costly.
- o There is a great need for more training of federal EEO officials regarding the nature of higher education.
- o Federal standards and interpretations of EEO requirements are far too inconsistent.
- o Too many federal agencies investigate the same matters and collect the same data. The inconsistency of their requirements adds to the problem.
- o The "adversarial" approach taken by many of the agencies is unwarranted and unproductive.
- o The agencies have failed in their promise to provide institutions with meaningful availability data.

In conclusion, our members feel that present requirements and the actions of agency officials and staff often do not help, but rather hinder their efforts to promote equal employment opportunity at their institutions. The system needs revamping.

Our associations have consistently offered to help the federal government better understand how higher education differs from industry. We have also offered to help the government understand our members' concerns and to formulate constructive changes in the current system. We stand ready to help.

If changes in the system have taken place in 1981 that answer some of the concerns we have expressed, please let us know so that we can inform our members. Otherwise, please do not hesitate to call on us if we can be of service.

CUPA

August 18, 1981

The Honorable Orrin G. Hatch, Chairman
Committee on Labor and Human Resources
4230 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the College and University Personnel Association (CUPA) and the National Association of College and University Business Officers (NACUBO) we are pleased to provide you with the attached copy of a report on EEO Paperwork and Recordkeeping Regulations. We recently submitted the report to the EEOC.

You will note that CUPA and NACUBO were signatories to the comments on OFCCP activities submitted to you in the past week by the American Council on Education. Our attached report parrots many of the remarks so ably expressed by ACE President Jack Peltason but also delves into areas not touched on in his comments.

We hope this material proves useful to you. We stand ready to assist you and your staff should you ever feel the need for such aid.

My best regards,

David H. Roots

David H. Roots
Assistant Executive Director/
General Counsel

DHR/dab

Attachment

CUPA EEO PAPERWORK AND RECORDKEEPING SURVEY

1. Within the last 12 months, how many reports requiring EEO data have you completed? Do not include reports that were required only because of an investigation/review.

No Answer	-	5
0	-	4
1	-	27
2	-	14
3	-	10
4	-	2
5	-	7
(3-5)	-	1
6	-	3
8-10	-	1
10	-	1
13	-	1
Over 13	-	2
Total	-	78
Total responses	-	73

CUPA EEO PAPERWORK AND RECORDKEEPING SURVEY

2. How many Federal agencies required these reports? Please list them.

No. of Agencies Requiring Reports	No. of Responses	Of the Responses, the Agencies Listed and No. Listing Them
*NO ANSWER	*12	*——
0	4	——
1	32	EEOC (18) HEW (5) HERC (4) OFCCP (2) HEGIS (1) ED (1) ? (1) Total 32
2	15	OFCCP/HEW (4) EEOC/OFCCP (3) EEOC/HEW (3) EEOC/NIH (1) EEOC/HEGIS (1) EEOC/DOJ (1) HEW/HERC (1) HERC/FCC (1) Total 15
3	11	EEOC/OFCCP/HEW (4) EEOC/NIH/USDA (1) EEOC/NIH/ED (1) EEOC/ED/HUD (1) EEOC/OFCCP/USDA(1) EEOC/HERC/DOE (1) OFCCP/HEW/HERC (1) HEW/CENSUS/HEGIS (1) Total 11
4	1	OFCCP, EEOC, HEW(OCR), HEW TITLE IX COMPLIANCE (1)
5	1	Human Affairs Commission, Employment Security Commission, Commission on Higher Education, Census, Legislative Audit Council (some are state agencies?) (1)
7	1	FCC, Interior, ED, OFCCP, EEOC, SBA Corporation for Public Broadcasting (1)
Many	1	Unlisted

CUPA EEO PAPERWORK AND RECORDKEEPING SURVEY

*Of those who gave N/A to question No. 2:

5 gave N/A to question No. 1

2 said they completed 1 report on question No. 1

1 said they completed 2 reports on question No. 1

2 said they completed 3 reports on question No. 1

2 said they completed 5 reports on question No. 1

Total: 12 N/A

CUPA EEO PAPERWORK AND RECORDKEEPING SURVEY

3. Within the last 12 months how many requests for workforce composition data have you received as the result of an EEO investigation or compliance review. Do not include the reports above.

0	-	31
1	-	13
2	-	12
3	-	5
4	-	6
5	-	2
6	-	1
7	-	1
Other:		
6+	-	1
10	-	1
12	-	1
10/12	-	1
16	-	1
20+	-	1
23	-	1
Total Responses		78

CUPA EEO PAPERWORK AND RECORDKEEPING SURVEY

4. Within the last 12 months how many times have Federal agencies conducted EEO investigations or reviews of your organization?

N/A	-	1	
0	-	32	
1	-	16	
2	-	12	
3	-	5	58% 1 or more
4	-	4	38% 2 or more
5	-	1	22% 3 or more
6	-	2	16% 4 or more
Other:			
13	-	1	
14-16	-	1	
15	-	1	
25	-	1	
37	-	1	
Total Responses		77	

CUPA EEO PAPERWORK AND RECORDKEEPING SURVEY

5. How many Federal agencies conducted the review(s)? (Partial answers and those not properly answering the question were thrown out.)

(36 N/A)

No.			EEOC	DOL/OFCCP	HEW/OCR	OTHER(S)
1	-	(20)	9	7	1	SBA, 504 review team, ED/OCR
2	-	(16)	EEOC/OFCCP 3	EEOC/HEW-OCR 2		OFCCP/ED'S OCR 3
			EEOC/ED'S-OCR 6		HEW-OCR/OFCCP 1	EEOC/USDA 1
3	-	(3)	FCC/OFCCP/DOE 1	EEOC/ED'S OCR/OFCCP 1		
			HEW-OCR/EEOC/OFCCP 1			
4	-	(3)	OFCCP/EEOC/HEW-OCR/HEW TITLE IX 1			
			EEOC/OFCCP/HEW-OCR/ED'S-OCR 2			

Total response 42

CUPA EEO PAPERWORK AND RECORDKEEPING SURVEY

6. The purpose of the investigation/review(s) was to:

(29 N/A)

(a) investigate a complaint

(b) investigate for discrimination without the existence of a specific complaint

(c) review your organization's development and implementation of its AA program

(a) only - 13
(b) only - 1
(c) only - 8
(a) & (b) - 2
(a) & (c) - 15
(b) & (c) - 3
(a), (b), & (c) - 7
Total response - 49

CUPA EEO PAPERWORK AND RECORDKEEPING SURVEY

7. In the last 12 months how many federal agencies have you received interpretations or statements of Federal EEO requirements from?

N/A - 2

7(a) Were the interpretations confusing or inconsistent?

	Yes	No
0 - 26		
1 - 12	9	3
2 - 10	8	2
3 - 8	4	4
3-4 - 1		1
3+ - 1	1	
4 - 4	2	2
5 - 2	2	
5+ - 1		1
6 - 2	1(1 sometimes)	
12 - 1	1	
Other:		
a small no. - 1	1	
many - 7	5	2
Total response - 76	35(70%)	15(30%)

CUPA EEO PAPERWORK AND RECORDKEEPING SURVEY

8. Following is a list of some common costs incurred in complying with Federal EEO requirements. Please rank them according to your organizations experience; assign number 1 to the item of greatest cost.

		1	2	3	4	5
A.	Cost of maintaining data and records required by Federal EEO statutes (5 N/A)	42	23	4	3	1
B.	Cost of reporting to Federal agencies in the event of specific enforcement activity, investigations, or reviews (9 N/A)	19	20	20	6	4
C.	Cost of developing recruitment and training programs mandated by affirmative action requirements (8 N/A)	12	13	22	16	7
D.	Cost of compliance with the Uniform Guidelines on Employee Selection Procedures (29 CFR 1607) (11 N/A)	2	9	13	24	18
E.	Cost of complying with several Federal agency requirements that differ (10 N/A)	2	4	9	19	33

CUPA EEO PAPERWORK AND RECORDKEEPING SURVEY

9. Following are some proposed changes to Federal EEO programs. Please rank those which, in your opinion, would be an efficient use of resources. Assign number 1 to the most desirable proposal.

		1	2	3	4	5
A.	Joint agency investigation of the same or similar charges (5 N/A)	10	11	8	27	17
B.	More training orientation of Federal EEO officials re: the nature of higher education (4 N/A)	26	13	12	15	8
C.	Joint collection and analysis of employer data (4 N/A)	13	20	16	13	12
D.	Consistent Federal standards and interpretations of EEO program requirements (4 N/A)	21	14	29	8	2
E.	Publications or other forms of technical assistance that more clearly describe Federal EEO requirements (4 N/A)	12	17	7	7	31

CUPA

October 26, 1981

James W. Cisco
Acting Director
Division of Program Policy
Office of Federal Contract
  Compliance Programs
U.S. Department of Labor
Washington, D.C. 20210

Dear Mr. Cisco:

On behalf of the College and University Personnel Association (CUPA), I would like to offer the following brief comments regarding the Office of Federal Contract Compliance Programs proposed revisions to regulations governing the affirmative action obligations of federal contractors (46 *Federal Register* 42968, August 25, 1981). For 35 years, CUPA has served as the principal professional organization for this country's higher education personnel administrators. A nonprofit association, CUPA represents more than 3,500 personnel administrators who themselves represent in excess of 1,100 colleges and universities.

On the whole, the August 25 proposals have been viewed by our members as a very positive step in the right direction. Our members have consistently supported the goals of equal employment opportunity and, when appropriate, affirmative action in higher education. However, they have been equally consistent in their criticism of many of the facets of OFCCP's enforcement procedures.

In particular, our members have indicated their growing concern with the present pre-award compliance review process. The OFCCP's avowed lack of experienced staff to conduct such reviews of higher education institutions has only increased the burdens that such reviews already exact in terms of much wasted time, effort, and finances. The elimination of the pre-award review will enable both the OFCCP and higher education institutions to spend more time and effort on reaching our mutual goal of equal employment opportunity. Thus, we strongly endorse the OFCCP's proposed elimination of the pre-award review process.

We support the proposal that would permit contractors who are determined to be in compliance, after a compliance review has been conducted, to develop and implement five year affirmative action plans. It is extremely important to reward such contractors for their good faith efforts, and this proposal could serve as a very strong incentive for contractors to voluntarily comply with the Executive Order's requirements.

The proposal to eliminate the requirement of an annual summary of a contractor's affirmative action plan is an excellent example of a way to reduce unnecessary paperwork, and should be adopted. In addition, the proposal calling for abbreviated plans by smaller contractors is likewise an excellent means for freeing up valuable resources of both the OFCCP and smaller institutions. Such resources can better be spent in areas more crucial to the attainment of equal employment opportunity.

We strongly agree with the position taken by the American Council on Education (ACE) in regard to the proposed rule which would require equal benefits for men and women, even when a contractor would have to make unequal contributions for men and women in order to provide equal benefits to employees of both sexes. We urge you to favorably consider the reasoning put forward by ACE in their comments concerning this provision and we recommend the withdrawal of section 60-1.21(c)(1) from the current proposals. The OFCCP should not act in this area until questions concerning sex equity in retirement benefits that are presently being considered by a variety of courts are answered.

Finally, we cannot stress too strongly our hope that the present use of form EEO-6, the Higher Education Staff Information Report, will not be affected by the adoption of the proposed rules. It is beyond dispute that use of the EEO-6 has resulted in a much more accurate reflection of college and university workforces.

Many investigators appear to have little or no knowledge of the existence of this valuable form, though it was approved by the OFCCP in 1975. We hope the OFCCP will continue to permit the use of Form EEO-6 and will provide OFCCP staff with the necessary training so that they can better understand and assess the information contained therein. As we have stated in the past, we stand ready to assist in such training efforts.

We thank you for this opportunity to comment on the proposals and hope you won't hesitate to contact us if we can be of further help.

Sincerely,

David H. Roots

David H. Roots
Assistant Executive Director/
General Counsel

The **Chairman**. We appreciate your coming.

With that, we will recess these hearings.

[Whereupon, at 11:20 a.m., the committee was recessed; to reconvene at the call of the Chair.]

OVERSIGHT ON THE ACTIVITIES OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE DEPARTMENT OF LABOR, 1981

THURSDAY, OCTOBER 22, 1981

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C.

The committee met, pursuant to notice, at 9:45 a.m., in room 4232, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman) presiding.

Present: Senators Hatch, Quayle, and Williams.

OPENING STATEMENT OF SENATOR HATCH

The CHAIRMAN. The committee will come to order.

I apologize for the delay. I have had a little bit of difficulty because my amendment is the pending amendment on the floor.

I have tried to arrange to have somebody else come over and help us with the hearing.

Today's hearing concludes this committee's effort at examining how OFCCP has administered Executive Order 11246 and the effects of its current regulations.

So far, we have learned from those who have come before this committee that all are supportive of the initial intent of the Executive order which was to improve the employment opportunities for women and minorities and eliminate discriminatory barriers.

We have also learned that the current regulations, as administered by OFCCP, give that staff unlimited powers to make unrealistic demands, harass, extort, and violate due process rights of Federal contractors.

We have heard OFCCP described as having used "Gestapo-like tactics," intimidating enforcement techniques, and having changed the rules of the game as it goes along.

We have heard that OFCCP is preoccupied with having contractors fastidiously follow the regulations as "they are interpreted on the spot" by compliance officers; yet these same people fail to follow their own procedures.

We have heard that OFCCP is more concerned with finding an affected class rather than evaluating what good-faith efforts contractors have made to increase opportunities for women and minorities.

Now, while there are some who have stated that these are only isolated cases, mounting evidence suggests that this behavior is the norm rather than the exception. Others argue that these problems are due to poorly trained staff and can be corrected by improving administrative procedures.

While I agree there is some truth to these arguments, nevertheless, the Executive order program is nearly 15 years old. That should be sufficient time in which to train staff.

I am more inclined to believe that the regulations allow, and perhaps even encourage, abuses by OFCCP staff. They clearly monitor the wrong objective. They measure how well a contractor follows highly technical reporting and recordkeeping requirements rather than whether the goal of the Executive order is being met.

The regulations do not measure the good-faith efforts of Federal contractors. They do not measure new employment opportunities created for minorities and women by Federal contractors, leaving us unable to tell whether they have made progress at all.

In short, it is highly questionable whether OFCCP has achieved the results for which it was created. It is even more questionable whether OFCCP ever understood what they were trying to accomplish.

One witness spoke of the large sums of backpay and debarments that OFCCP was able to obtain; yet OFCCP could not tell this witness how many jobs they had created since they did not keep that information.

The committee staff conducted a pilot survey to examine the manner in which OFCCP conducted its compliance reviews.

Below are some highlights of that study which covered 224 Federal contractors.

Without objection, I would put these into the record at this point.

Contractors were often selected for extensive, wide-ranging investigations on the basis of company size and visibility in the community, not because of complaints of discrimination.

OFCCP was arbitrary and unreasonable in their demands for contractor responses to notices of deficiencies. Response times varied from one-half hour to 60 days even though thousands of pages of information would have to be reviewed in order to reply properly.

When OFCCP was unable to discover any substantive violations of the Executive order after issuance of a 30-day show-cause notice, it would regularly amend the notice in order to give the agency additional time to conduct fishing expeditions.

Debarment proceedings were instituted against 20 percent of the contractors surveyed because the companies failed to make minor technical changes in the voluminous reports required to be maintained by OFCCP regulations. The dispute concerned compliance with reporting requirements, not whether the contractor was engaging in affirmative action.

In summary, the pilot survey corroborates the statements of previous witnesses. In order to examine these problems more thoroughly, I will be requesting the GAO to conduct a study of the manner in which OFCCP conducts its compliance reviews.

Toward the longstanding national goal of ending discrimination, this committee is concerned with results, not paper shuffling exercises, or creating needless adversity between Federal contractors and their own Government. Such practices, in the long run, are counterproductive. They do not create an atmosphere that will allow Government and the private sector to work together to improve employment opportunities for women and minorities.

After today's hearing, we will move to the most important next step—What are the solutions?

Our next set of hearings, now scheduled for December 1 and 2, will entertain answers to the following questions:

One, if we still believe we should pursue the national goal of improving opportunities for women and minorities, how could we best realize that goal?

Two, what programs and policies should we develop?

Three, what should be the proper role of Government, the private sector, and other groups in furthering this national goal?

It is my belief that we too often view multifaceted problems as single issues and end up with a patchwork of escalating and unrelated programs. For example, can we prove that the only reason minorities and women are underrepresented in the work force is because employers discriminate? Could it be due to a host of other factors, such as lack of opportunity for education—elementary schools—and training, physical and emotional problems, lack of child care options, family values and stereotypical thinking, and discrimination? If we concentrate only on the belief that the problem is solely due to employers' discrimination, then we place an undue burden on a single segment of our society for a problem which has many causal factors; but we also shortchange ourselves in seeking ways to achieve our stated national goal—the creation of opportunities for women and minorities. Analyzing the problem from a broader perspective will highlight the interrelated factors in the problem, and help us develop a national thrust which is more coordinated, cost-effective, and will stimulate and pull our various interested parties together rather than continue in this conflict-laden atmosphere in which employers, civil rights groups, and our compliance agencies now find themselves.

Finally, all of us, especially Congress, must be ever vigilant. We must constantly scrutinize our Federal agencies with candor and diligence, for there is the inherent tendency for bureaucracies to quickly develop hardening of the arteries and become preoccupied with process and forget results. Our pursuit of our national goal is too important to allow it to be sidetracked, splintered, and burdened with needless confrontation. What I am calling for is a pooling in a reservoir of the good will and creativity that exists in the American populace. We have proven that the American people, when challenged, have always been able to pull together to solve our problems.

I ask that you join me in working toward our stated national goal of improving employment opportunities for women and minorities and that we demonstrate what Americans can accomplish when "we get it together."

Today I am requesting that interested parties who want to join this committee in seeking ways of working toward our goal begin thinking creatively and without constraints. Let us be limited only by our own vision rather than the reality we have. Our challenge is great—so must be our response.

Our first witness is the Honorable Robert Thompson, chairman of the labor relations committee and treasurer-elect of the National Chamber of Commerce.

Mr. Thompson, we are happy to have you here today. I understand you are accompanied by Mr. Tysse.

I have to apologize to you. I have to get to the floor because my amendment is pending and it is a hotly contested one.

Because that happened late last night, we were unable to get another Senator to come at this point to hear this.

I am going to listen for a few minutes and then have my staff member take over until I can go and get another member of our committee to come and assist on this matter.

STATEMENT OF ROBERT T. THOMPSON, THOMPSON, MANN & HUTSON, WASHINGTON, D.C., AND REGIONAL VICE CHAIRMAN, CHAMBER OF COMMERCE, ACCOMPANIED BY JOHN TYSSE, DIRECTOR OF LABOR LAW, CHAMBER OF COMMERCE

Mr. THOMPSON. Thank you, Mr. Chairman, for this opportunity.

We have prepared and submitted to the committee a statement of our testimony which is a lengthy document. I would like to ask that this be included in the record, and I would be allowed to summarize.

The CHAIRMAN. Without objection, your full statement will be placed in the record at the completion of your oral presentation.

We would certainly appreciate it if you would summarize, and you may proceed.

Mr. THOMPSON. Thank you, Mr. Chairman.

My name is Robert Thompson. I am the senior partner of the law firm of Thompson, Mann & Hutson, Washington, D.C., and Greenville, S.C.

I serve as a regional vice chairman of the board of the directors of the chamber as well as chairman of its labor relations committee.

As you know, I have appeared a number of times before this committee. We feel especially privileged to have the opportunity to appear on this particular subject, which is of great concern to our members throughout this country.

The chamber is the largest federation of business and professional organizations in the world, and is the principal spokesman for the American business community, representing 187,000 business firms, 2,700 State and local chambers, and 1,300 trade and professional associations.

I would like to take this opportunity to commend the chairman and the members of the committee for scheduling these hearings.

The necessity to document the problems which have arisen under the program and to identify solutions has never been more pressing.

We would also like to favorably acknowledge the regulatory reform efforts that are occurring at the Department of Labor under the leadership of Secretary Donovan and OFCCP Director Ellen Shong.

Although we do not believe the proposed regulatory changes published by OFCCP on August 25 will do much to alleviate the substantial problems existing under the program, nevertheless we applaud the recognition by the Labor Department that changes are needed.

Whether the Department can rise to the task of achieving meaningful reform remains to be seen.

Before proceeding with out attempt to catalog the serious problems and deficiencies which have characterized OFCCP's administration and enforcement of the affirmative action program, we would point out that there is a serious question raised as to the legality of Presidential Order No. 11246.

The memorandum attached to our written testimony details our reasoning.

In addition, the memorandum concludes that even assuming the legality of the Executive order, it does not authorize back pay or other retrospective remedies by direction or implication.

In order to characterize or pinpoint the problem we see with the Executive order and the administration, I would like to quote to the committee some of the comments which we have received from members—not solicited but simply volunteered to us in complaint about the way this Executive order is being administered.

I am quoting here from a communication from a member:

> Inflexible administration; arbitrary imposition of internal policies and procedures; demands for unnecessary, burdensome, and sensitive information; repeated inefficient practices; compliance officers often seem preoccupied with form and format and not substance; inconsistencies from region to region, from office to office, and from inspector to inspector.
>
> What we have experienced is frustration—frustration with the lack of appreciation and understanding of production operations on the part of compliance officers, frustration with compliance efforts that have addressed the mechanics and format of an affirmative action program rather than its content, and frustration with the OFCCP in its unbusinesslike conduct.
>
> Our experience has been a continuous stream of supplying vast quantities of paperwork and meeting with endless delays in resolving problems.
>
> We object most strenuously to the amount of nonproductive time and effort spent in the course of a compliance review when that same energy could be channeled toward true affirmative action efforts.
>
> Have sometimes been subject to unnecessary and unproductive threats of a show cause notice during expensive and drawn-out compliance reviews where we have made demonstrable achievements and discrimination is not even an issue.
>
> Our last three auditors wanted the format of our affirmative action to conform to each of their individual wishes.

Those are simply some of the comments which we have received, and we have received many, many more about this program.

I must say that they all have been unfavorable. The experience of most of our members has been unsatisfactory in dealing with the OFCCP.

We not only commend the committee for looking into these practices, but we strongly urge the committee to analyze the complaints and the practices and to allow us to come back here and make recommendations as to corrective action which can be taken.

I will not even go further with my summary other than to say to the chairman that I have personally experienced dealings with compliance officers of the OFCCP all over the United States, at the field level, at the regional levels, and at the Washington level. In the years that this Executive order has been in existence, and I think they number about 15 or 16 now—and I think there were some orders prior to that going back to about 1961 or 1962—my experience without exception has been that I have never had the same interpretation. I have never even had the same treatment from one conference to the next.

Of recent months, I have not even been able to get the field people or the supervisory people at the regional levels to tell me whether they are still demanding or insisting on claims for back pay or whether they have abandoned that type of claim.

The affirmative action programs which they have attempted to impose on my clients and other members of the chamber have been from anything to just giving a piece of paper that I can say is OK, which I consider to be irresponsible, to the most minute scrutiny of an employer's employment practices down to the last word—things which small business people are unable to comply with and things which large businesses, while they comply with it, stick aside somewhere and only get back out when the compliance officer is coming back around.

I would say it is much like the OSHA programs which we testified about last month.

The OFCCP program has been a bureaucratic donnybrook. It has been practically all form and very little substance. I think if you go to the popular term now—the bottom line—the OFCCP, the affirmative action programs, and the Executive order have accomplished absolutely nothing if you view them in terms of the objectives which they purport to seek—that is, equal employment for minorities and women.

Perhaps put another way, it is proper utilization of minorities and women.

They simply have not achieved their purposes. I do not think they have even made a step in that direction.

Something needs to be done.

As I say, we would like to come back here again at the appropriate time and make specific recommendations as to administrative and legislative action which is needed to make this program successful and productive if it is to be continued.

We would like to reserve the right if we may to take a position on that very point itself, because we have serious questions.

I personally think the OFCCP should be abolished, but if the program is to be continued, then we would like to make specific recommendations at a later date as to how it could be improved and be made productive.

The CHAIRMAN. We hear, Mr. Thompson, that the business community's concern for regulatory relief is a "paper smokescreen" for not wanting to press forward with affirmative action efforts. Do you agree with that?

Mr. THOMPSON. I certainly do not.

The paperwork under the Executive order and the OFCCP programs is probably one of the best examples of bureaucratic abuse that you could find.

If you could see some of these affirmative action programs that they insist upon and go into such minute detail on and literally set quotas regardless of what they are called and require employers to go out and do vast elaborate analyses of labor markets and labor availability and all of that sort of thing, you get a little bit of an idea of the terrible burden—especially on small businesses, which are the bulk of our members—that this program imposes.

The **Chairman**. I am going to submit some written questions to you and ask that you respond to them within a week if you can.

Mr. **Thompson**. We would welcome the opportunity.

The **Chairman**. We do appreciate it, and we are happy to have had your testimony here this morning.

[The prepared statement of Mr. Thompson and response to questions from Senator Hatch follows:]

STATEMENT
on
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS
of the
UNITED STATES DEPARTMENT OF LABOR OVERSIGHT
before the
SENATE LABOR AND HUMAN RESOURCES COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Robert T. Thompson
October 22, 1981

My name is Robert T. Thompson. I am senior partner in the law firm of Thompson, Mann and Hutson of Washington, D.C. and Greenville, South Carolina. I also serve the U.S. Chamber as a Regional Vice Chairman, as a member of its Board of Directors, and as Chairman of its Labor Relations Committee. With me today is G. John Tysse, Director of Labor Law for the Chamber.

We welcome this opportunity to express our views on the Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) and it's administration and enforcement of affirmative action requirements for Federal contractors under Presidential Executive Order (EO) 11246.

The U.S. Chamber is the largest federation of business and professional organizations in the world, and is the principal spokesman for the American business community. The Chamber represents more than 187,000 business firms, 2,700 state and local chambers of commerce, and 1,300 trade and professional associations.

The Chamber's business members range from the very largest corporations to small individually-owned enterprises. In fact, 85% of the Chamber's members employ less than 100 employees. Many of our members, both large and small, are Federal government contractors and are vitally concerned with the administration and enforcement of the EO program.

I would like to take this opportunity to commend the Chairman and members of the Labor and Human Resources Committee for scheduling these hearings. The necessity to document the problems which have arisen under the program and to identify solutions has never been more pressing.

We would also like to favorably acknowledge the regulatory reform efforts that are occurring at DOL under the leadership of Secretary of Labor Donovan and OFCCP Director Ellen Shong. Although we do not believe the proposed regulatory changes published by OFCCP on August 25 will do much to alleviate the substantial problems existing under the EO program, nevertheless we applaud the recognition by the Labor Department that changes are needed. Whether the Department can rise to the task of achieving meaningful reform remains to be seen.

The Executive Order Program Is of Questionable Legality

Before proceeding with our attempt to catalogue the serious problems and deficiencies which have characterized OFCCP's administration and enforcement of the affirmative action program, we would point out that there is a serious question raised as to the legality of EO 11246. The attached legal memorandum (Attachment A) details our reasoning. In addition, the memorandum concludes that, even assuming the legality of EO 11246, it does not authorize back pay or other retrospective remedies by direction or implication.

Nevertheless, short of significant executive or legislative action, these are questions which must ultimately be resolved by the Courts. Because there are no guarantees as to when, or how, these issues will be judicially addressed, we believe prompt executive or legislative action is the only practical way in which the existing problems in the program can be rectified.

OVERVIEW

As we have stated, most of the current controversy over the contract compliance program is not concentrated on the legality of the federal government's requirement that contractors engage in affirmative action. In fact, most employers have accepted the provision and have demonstrated, in varying degrees, their commitment to this social policy. What is at issue, however, is the government's approach to enforcement. Over the last decade, the regulatory requirements of OFCCP have proven to be arbitrary, unnecessarily burdensome, and repetitive. The demeanor of agency officials has often been antagonistic and inflexible.

OFCCP has had a standard response to criticisms such as these: if you don't like it, you don't have to contract with the Federal government.

Jurisdictional Thresholds

OFCCP's existing regulations establish some basic jurisdictional thresholds which affect coverage of the program. The term "government contract" includes all contractual agreements between a federal department or agency and any individual, corporation, partnership, unincorporated association, and state and local government for the furnishing of supplies or services or the use of real or personal property, including leases. Services include utility, construction, transportation, research, insurance and fund depository contracts or agreements.

To narrow this universe, OFCCP has stated that the program applies only to those possessing a federal contract or subcontract which exceeds $10,000. In addition, any employer with a supply or service contract or subcontract in excess of $50,000 and with 50 or more employees must maintain a written affirmative action program (AAP) in each of its establishments. (This threshold for a written AAP would be increased under the proposed regulations to $1,000,000 and 250 employees). OFCCP has estimated that 16,767 individual companies are required to maintain an AAP. Since most of these are multi-establishment entities, the agency estimates that 107,915 written AAP's are currently required.

OFCCP contends the EO covers only those who choose to do business with the government. This ought to be true, but it isn't. The truth is that OFCCP's authority has been [illegible]-strapped to the point that it is virtually impossible for an employer to avoid being a government contractor subject to it's jurisdiction. Let me give you four examples of the rules OFCCP has used to extend its jurisdiction over employers regardless of whether they have chosen to be government contractors.

(1) The EO on its face provides that, if a contractor is to be covered by it, that fact shall be spelled out in the contract itself. In view of all that is entailed in complying with the Order, notice is a vital element of fairness. But OFCCP has, in effect, written this notice provision out of the Order. Its regulations authorize it to assert jurisdiction based on contracts which make no reference whatever to the EO. The fact that the contractual notice may have been omitted entirely through the fault of the contracting agency, and through no fault of the contractor, makes no difference. The fact that the contractor may have had no notice of the omission makes no difference. The hardship this regulation may work on the contractor makes no difference.

This is wrong. The Federal government is responsible for including EO provisions in contracts covered by the Order. OFCCP is an agency of the Federal government. If the Federal government fails to draft its contracts correctly, it is not fair to make the private contractor suffer the consequences. Clearly, fairness should provide that OFCCP cannot assert jurisdiction based on contracts which do not specifically state that they are covered by the EO.

(2) It is commonly believed that the contracts under $10,000 are exempt from coverage under the Order. In fact, however, OFCCP's regulations do not bind OFCCP to that threshold amount. It can also assert jurisdiction over contractors who have no government contracts or subcontracts over that amount if their government contracts or subcontracts total $10,000 in any one year. This makes it much harder for an employer to know whether signing a particular contract will, in fact, subject him to the Order.

Under the previous administration, OFCCP considered extending its rules on aggregation so that they would apply not only to the $10,000 threshold for coverage but also the $50,000 threshold for drawing up written AAPs. OFCCP is now reconsidering that extension. Such reconsideration is wise, but OFCCP should drop completely the needlessly confusing and complex idea of aggregation of threshold amounts.

(3) The EO covers subcontractors -- employers who contract with companies that are, in turn, government contractors. Prime contractors are supposed to notify their subcontractors if they are covered by the Order, but in practice it is often impossible for them to separate goods and supplies which go into their government contracts from those which do not. Even if they could do this, the rules on aggregation make it almost impossible to know when a subcontractor has reached the threshold amount for coverage. To protect themselves, most companies believe they must require their suppliers to sign certificates that they comply with EO 11246, regardless of whether their suppliers are, in fact, covered by the Order. The suppliers have the choice of signing these certificates or losing the business. They often have no way of knowing whether the Order really applies to their contracts. But, if the issue is raised, these certificates can be used against them as admissions of coverage.

(4) The final factor which undercuts employer choice is the fact that, if an employer has one contract covered by the Order, his whole work force is covered, including employees who have no connection whatever with the government contract work. For example, one officer in one subsidiary of a large company can unknowingly sign a contract covered by the Order. It can be a contract that makes no reference to the Order or a contract well under the $10,000 threshold. Under OFCCP rules, all of the employees of his own company, and all of the employees of all of his affiliate companies as well, are suddenly covered by the Order. This can happen even though employees in these affiliates do no government work at all.

Written Affirmative Action Programs

These programs must contain, among other things, (1) a statement of the contractor's commitment to a policy of equal employment opportunity, (2) a list of the corporate executive(s) responsible for the program, (3) the duties of the various officers and line managers in implementing the program, (4) an internal auditing system, (5) a utilization analysis which contains work force and availability analyses, (6) goals and timetables where necessary, (7) identification of problem areas in recruitment, selection, and other employment conditions, (8) specific affirmative action steps to correct and remedy identified problem areas, and, (9) an explanation of how the program will be disseminated. These programs must be updated annually, and, while the actual length varies, they often are several hundred pages long. The cost to employers in preparing these reports is substantial.

The Utilization Analysis

The utilization analysis is the principal feature of all AAP's because it provides the mechanism for determining whether goals and timetables are necessary. The analysis is a chart which compares the utilization of minorities and women in the various job groups within an employer's workforce with the availability of minorities and women in the appropriate labor market. If this comparison indicates that minorities or women are underutilized in one or more job groups, goals are required to correct this deficiency.

The first half of this comparison is established through the formation of job groups. This involves dividing all the jobs in a contractor's workforce into groups, based on content, wage, and opportunity similarity.

The second half of the comparison is based on a determination of the availability of minorities or women for the job group in question, the single most difficult and controversial aspect of any affirmative action plan. Problems with this element of an AAP are based largely on how availability is defined and the subjectivity of its determination.

The government typically defines availability as the number of minorities or women who have the necessary skills required for entry into a job group, or who are capable of acquiring them. Contractors normally define availability in terms of those who possess the necessary skills to fill an opening. The two definitions are hopelessly at odds. One focuses on current skill possession, while the other centers on a person's capabilities, a virtually impossible feature to measure with any objectivity.

Contractors are also required to establish availability by considering and quantifying the following eight factors, the so-called "8-Factor Analysis":

1. the minority population of the labor area surrounding the facility (for women, the availability of women seeking employment in the labor or recruitment area);
2. the size of the minority or female unemployment force in the labor area surrounding the facility;
3. the percentage of the minority or female workforce as compared with the total workforce in the immediate labor area;
4. the general availability of minorities or women having requisite skills in the immediate labor area;
5. the availability of minorities or women having requisite skills in an area in which the contractor or subcontractor can reasonably recruit;
6. the availability of promotable and transferable minorities or women within the contractor's or subcontractor's organization;
7. the existence of training institutions capable of training persons in the requisite skills; and
8. the degree of training which the contractor or subcontractor is reasonably able to undertake as a means of making all job classes available to minorities or women.

Separate availability analyses must be prepared for each job group, for women, for total minorities, and for each minority group representing more than 2% of the population in the appropriate labor market. Also, availability must be stated as a percentage.

The subjectivity of such determinations is a constant source of confusion and consternation to contractors. All eight factors rarely apply to any one job, and the importance of certain factors varies depending on the job in question. In addition, the factors are not mutually exclusive.

Unfortunately, any determination of availability, no matter how well it is documented, is in large part an estimate and, thus, subject to interpretation. Often, during the compliance review process, availability represents a negotiated compromise between the contractor's estimate of the number of minorities and women actually qualified for a job and the government's estimate of the number of minorities and women who would be available absent discrimination. The ultimate determination, therefore, is a subjective judgment through a process which permits the government to exercise broad arbitrary leverage.

Underutilization

The problems with availability are compounded by its use in the utilization analysis. As mentioned earlier, goals and timetables are required for any job group in which minorities or women are underutilized. OFCCP defines underutilization as occurring where there are fewer minorities or women in a job group than would be reasonably expected, given their availability. The agency's compliance manual, however, defines underutilization as any numerical disparity even if only a "fraction" of a person is involved.

For example, if a company has a job group which is comprised of 50 employees, including 5 minorities, it would be considered underutilized if OFCCP determines availability for this group to be 11%. Eleven percent of 50 is 5.5. Because the contractor employs only 5 minorities, it is half of a person away from utilization, and therefore, must set a goal for this particular job group.

Goals and Timetables

Once underutilization is found within a job group, the contractor or subcontractor must set goals to eliminate the deficiency. "Ultimate" goals must be set which are designed to achieve a percentage representation of minorities and women equal to their availability for the job group in question. Timetables for achieving these ultimate goals must also be established along with "annual" goals, which are designed to measure progress towards the "ultimate" goals. The "annual" goals must be expressed numerically and may exceed actual availability in order to bring the contractor into full utilization as quickly as possible. As with all components of an affirmative action plan, goals and timetables are subject to annual revision.

Good Faith Efforts

In practice, there has always been a substantial question on whether goals and timetables are simply euphemisms for quotas. OFCCP has maintained that they are not, that they are merely targets. It claims that failure to meet a goal will not result in noncompliance if a contractor can demonstrate to the agency's satisfaction that "every good faith effort" to implement the goal has been undertaken. For example, a contractor who falls short of a goal will not be held responsible if it can prove extenuating circumstances, such as an unanticipated decrease in the rate of employee turnover or the cancellation of a major contract that would have generated more job opportunities.

In the real world, however, the distinction between a "goal" and "quota" is often blurred. For example, a lower level supervisor may be kept informed of the goal or goals for his shop or department and is aware that promotion or salary improvement may depend in part on his ability to meet these goals. To him, goal clearly means quota.

Affected Class Determinations

AAP's are also required to contain the remedial steps a contractor will undertake to correct any "affected class" within its workforce. It is OFCCP's position that EO 11246 requires not only prospective action but also the elimination of past, systemic discrimination.

Each AAP must have a workforce analysis which is a listing of all the job titles at the facility in question, ranked from the lowest to the highest paid within each department or organization unit. The workforce analysis is then used by OFCCP to determine the presence of an affected class.

OFCCP's compliance manual cites evidence of an affected class by: substantial under-representation; adverse impact (i.e., employment policies which have a disproportionately negative effect on women and minorities); concentrations; wage discrimination; policies which perpetuate past discrimination; and policies discriminatory on their face.

Where it finds affected classes, the agency normally seeks "rightful place" modifications and, more recently and frequently, back pay for members of the class.

Indeed, in practice, OFCCP employment opportunity specialists have assumed the posture that seeking affected class relief is now their primary function, despite the fact that Congress specifically vested the Equal Employment Opportunity Commission (EEOC) with that charge.

OFCCP DUPLICATES AND EXCEEDS AUTHORITY GIVEN TO EEOC

OFCCP's increasing involvement in seeking retrospective relief, notably back pay, duplicates the Congressionally mandated responsibility given to EEOC and private plaintiffs under Title VII of the Civil Rights Act of 1964 and other anti-discrimination laws. There is no need nor justification for this overlap. The investigation, prosecution, settlement, or adjudication of discrimination claims and the responsibility for affording retrospective relief to alleged victims of discrimination should be left to EEOC and private plaintiffs under

Title VII and other statutes. Title VII, and through it EEOC, have the teeth necessary to ferret out employment discrimination. This is what Congress intended and that intent should be honored.

Beyond this duplication, OFCCP has, in addition, intentionally ignored clear Congressional intent by deciding that Congress had not gone far enough in dealing with "bona fide" seniority systems.

When it enacted the Civil Rights Act of 1964, Congress, as a matter of public policy, included an exemption for bona fide seniority systems. It enacted similar exemptions for seniority systems in the two other major Federal EEO statutes -- the Age Discrimination in Employment Act and the Equal Pay Act. The Supreme Court subsequently held, under Title VII, that Congress intended the exemption to apply even where the seniority system has a disparate impact on minorities. Despite this clear and repeated statement of Congressional intent to protect bona fide seniority systems from invalidation under the EEO laws, and despite the Supreme Court's upholding of that intent, OFCCP believes otherwise. It has taken the position that if a seniority system has a disparate impact on women and minorities, it is a violation of EO 11246, unless it can be justified by "business necessity."

In U.S. v. East Texas Motor Freight System, Inc., 564 F.2d 177 (5th Cir. 1977), the Fifth Circuit Court of Appeals held that a bona fide seniority system covered by the exemption in Section 703(h) of Title VII cannot be challenged as a violation of the EO. It held "the argument cannot be accepted because Congress has declared for a policy that a bona fide seniority system shall be lawful. The Executive may not, in defiance of such policy, make unlawful -- or penalize -- a bona fide seniority system."

We believe the Court was correct in rejecting OFCCP's position. This is especially so when you consider that the agency is not attempting merely to carve out an exception for a limited number of employers who have freely chosen to contract with the Federal government. As we have pointed out, in one way or another, it lays claim to jurisdiction over almost every employer in this country.

OFCCP has acted contrary to the will of Congress in other areas, too. For example, Congress passed the Contract Disputes Act of 1978 to provide a fair, balanced and comprehensive statutory system for resolving government contract claims. The statute applies to almost all contracts entered into by executive agencies for procurement of goods and services. The Act does specify exemptions from coverage, but we have found no exemptions that apply to OFCCP. The Act provides that "all claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer." If the contractor is dissatisfied with the contracting officer's decision, he can appeal either to an agency board of appeals or to the Court of Claims. The choice is the contractor's.

It has ignored the Contract Disputes Act. It insists on following its own administrative procedure, which flouts many of the safeguards which Congress has accorded contractors in the Contract Disputes Act. For example, the Act provides an expedited procedure for small claims. It specifies that "the small claims procedure shall be applicable at the sole election of the contractor." The Senate Report on this provision of the Act explained "(s)ince the accelerated procedure may limit some of the due process available before an agency board, the contractor should be allowed to decide if he wishes to sacrifice some of his rights. He should not be forced to do so by the government."

OFCCP also uses an expedited procedure, but without the fairness that Congress provided in the Contract Disputes Act. OFCCP's expedited procedure provides limited discovery rights. Interrogatories, for example, are not permitted. This presents no serious problem for OFCCP because it doesn't need discovery after a complaint is filed. It has the self-declared right to gather all the information it needs during investigation. If the agency decides it doesn't have enough information when a complaint is filed, it won't use the expedited procedure. On the other hand, limited discovery is very prejudicial to an employer trying to defend himself. Unlike OFCCP, the employer is not permitted to discover the government's position during investigation. The employer has no say in whether the expedited procedure will be invoked. He has very little opportunity to discover what the government's claims against him are. This unfairness is compounded by the fact that OFCCP's regulations provide for "notice" pleading in the complaint, although it is not required in its complaint to state the facts that underlie its claims. But a contractor's answer must "contain a statement of the facts which constitute the grounds for defense." To make things even harder on the contractor, once OFCCP has completed its investigation at its own pace, this expedited proceeding is to be rushed to decision within 70 days after issuance of the complaint. If effect, the only thing "expedited" is the contractor's defense. | Once a contractor has been hauled through OFCCP's administrative gauntlet, he has no further chance for a real day in court. He can appeal, but he will get only a review of the lopsided record established before OFCCP, not a de novo hearing. He never gets a fair chance to establish a record.

And if he loses, he finds himself at OFCCP's mercy, unless a court intervenes with a stay. The ultimate sanction against contractors who take the agency on is debarment from government contracts. In the case of an employer that does a great deal of business with the government, the impact is obvious. But it is also important to recognize that the impact of debarment extends even to employers who have no desire to contract with the federal government.

OFCCP's power stems in large part from its ability to cut a contractor off from the rest of the private business community. In theory, it can prevent other companies from contracting with the debarred subcontractor only if government work is involved. In practice, it is difficult or impossible for most companies to distinguish their government from their nongovernment work. For their own protection, companies that are or may be within OFCCP's jurisdiction will probably choose a supplier other than the debarred supplier. Why take a chance?

Most government agencies recognize the damage debarment can do, and use it with restraint. A review of the government's general procurement regulations shows that procurement officials are instructed to use the debarment sanction sparingly, as a last resort, for limited periods and under limited conditions. OFCCP respects no such limits. It uses the threat of debarment freely against those who question its authority and threatens debarment over large and small matters alike. Debarment is for an unlimited period. OFCCP takes the position that a debarred contractor is not entitled to have the debarment lifted by simply correcting whatever it was that got him debarred. Its regulations provide that the contractor must first satisfy OFCCP that it will comply with all of its policies in all areas.

The agency is unfair and its procedures are unfair. They are an extreme example of the very abuses that led Congress to enact the Contracts Disputes Act.

ADMINISTRATION AND ENFORCEMENT ABUSES ARE NOT ISOLATED

We have attempted to outline a few of the many problems which have arisen in OFCCP's administration and enforcement of the affirmative action program.

Proponents of the existing program are quick to allege that the instances of abuse are rare and that the program has produced demonstrable evidence of increased hirings and promotions of women and minorities.

We submit that abuse permeates the program, and that the demonstrable progress by government contractors in increasing employment and promotional opportunities for minorities and women have been achieved in spite of OFCCP's efforts rather than because of them. In fact, in its 16 years of existence, OFCCP has never undertaken any kind of analysis to determine how effective it has been in advancing these opportunities, or whether, even, it has been effective at all.

In testimony before this Committee on July 29, Mr. Robert Beck, Chairman of the Prudential Insurance Company -- a company that is willing to stand on its affirmative action record -- detailed an ongoing OFCCP compliance review in which Prudential has thus far invested $1.5 million despite not one allegation of a substantive deficiency. And as Mr. Beck stated: "Most important of all, this entire process has not provided a single member of a protected class with new employment."

The Prudential experience is not isolated. The following are specific examples of comments we have received from Chamber members who have written us about their experience with OFCCP:

- "inflexible administration"
- "arbitrary imposition of internal policies and procedures"
- "demands for unnecessary, burdensome, and sensitive information"
- "repeated inefficient practices"
- "Compliance officers often seem preoccupied with form and format, not substance"
- "inconsistencies from region to region, from office to office, and from inspector to inspector"
- "What we have experienced is frustration -- frustration with the lack of appreciation and understanding of production operations on the part of compliance officers -- frustration with compliance efforts that address the mechanics and format of an AAP rather than its content -- frustration with the OFCCP in its unbusinesslike conduct."
- "Our experience ...has been a continuous stream of supplying vast quantities of paperwork and meeting with endless delays in resolving problems"
- "We object most strenuously to the amount of nonproductive time and effort spent in the course of a compliance review when that same energy could be channelled toward true affirmative action efforts"

- "have sometimes been subject to unnecessary and unproductive threats of a show cause notice during expensive and drawn-out compliance reviews where we have made demonstrable achievements and discrimination is not even an issue"
- "Our last 3 auditors wanted the format of our AAP to conform to their individual wishes."

We know the Committee has numerous other examples along these lines, and will hear testimony later this morning from individual companies with comparable complaints and experienced. Let me stress again that these examples are not isolated, but in fact are representative of the way in which OFCCP has routinely administered and enforced the program.

These are not employers who are attempting to thwart their affirmative action obligations. Rather, they are typical of the vast majority of government contractors who accept this approach and would be accomplishing results much more rapidly but for the problems we have articulated involving the OFCCP.

The foregoing discussion leads to one unalterable conclusion regarding the OFCCP's administration and enforcement of the affirmative action program: unless fundamental changes occur, the program will never achieve its intended results of increasing employment and promotion opportunities for minorities and women.

RESTRUCTURING THE PROGRAM

As the Committee moves forward in its hearings, it will be exploring potential solutions to the major problems which have arisen. One of the difficulties inherent in this process is the tendency to seek changes within the existing framework of the program rather than to step back and consider an entirely new approach. For example, the changes proposed so far by DOL are entirely within the confines of the present EO and the regulatory structure underlying the Order. If the Department continues to proceed along these lines, some limited relief will be provided, particularly to smaller contractors. For this we are pleased. Nevertheless, the fundamental deficiencies in the program will remain. To that extent, the social goal of enhancing employment and promotional opportunities for minorities and women under a federal contract compliance program will be frustrated.

To ensure a competent work force, employers must have the right to employ or promote best qualified applicants/employees without regard to race, sex, religion, color or national origin. In those areas where economic, geographic or social conditions have deprived some persons of employment opportunities, employers should take affirmative action to recruit, employ, train and promote qualified members of the protected classes. Such outreach efforts might include special recruitment programs, training programs and provisional employment, but at no time should qualified applicants or employees be denied employment or promotion solely because they are not members of a protected class. Our concept of affirmative action includes the belief that the road to equal employment opportunity for one group should not be paved with new varieties of discrimination against other groups. While we oppose the imposition of quotas or other discriminatory devices on employers, we support and encourage measurable methods to increase participation in the work force through voluntary use of goals, timetables, and good faith effort.

CONCLUSION

We have attempted to demonstrate that the administration and enforcement of the present affirmative action program for government contractors are rife with inherent deficiencies that can be corrected only by major revisions.

Two potential approaches for achieving this change are a substantially revised Executive Order or new legislation.

While we are not prepared at this time to come forward with specific proposals, we are actively working on this issue with the purpose of developing solutions to the problems posed.

We would very much appreciate the opportunity, at some time in the future, to appear again before the Committee to share the results of this labor and to provide whatever assistance we can in coming up with a fair, and workable, program.

Attachment

ADVANCING VOLUNTARY LEADERSHIP IN A CHANGING WORLD

Chamber of Commerce of the United States
HUMAN AND COMMUNITY RESOURCES DIVISION
LABOR LAW SECTION
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September 1, 1981

MEMORANDUM OF LAW

WHETHER BACK PAY AND AFFECTED CLASS RELIEF ARE AUTHORIZED UNDER THE EXECUTIVE ORDER PROGRAM

INTRODUCTION

Executive Order 11246 (E.O. 11246) was issued September 24, 1965, by President Lyndon B. Johnson. The Order required that anyone who contracted with the Federal government must agree (1) not to discriminate against employees or applicants on the basis of race, color, religion, sex,1/ or national origin, (2) to take affirmative action to insure that applicants and employees are employed without regard to those factors, (3) to comply with all provisions of the Executive Order, and the rules, regulations and orders of the Secretary of Labor issued pursuant to the Order, (4) in the event of non-compliance with the Order or rules, to be subject to cancellation, termination or suspension of existing contracts, or to be declared ineligible for further government contracts, and (5) to bind all subcontractors and vendors to the provisions of the Order.

In 1966 the Secretary of Labor, who has primary responsibility for the administration of the requirements of E.O. 11246, established the Office of Federal Contract Compliance (O.F.C.C.). That agency, predecessor of the Office of Federal Contract Compliance Programs (O.F.C.C.P.), has overall administrative responsibility for the program.

The rules and regulations prescribe that every contractor and subcontractor having 50 or more employees and a contract or subcontract amounting to $50,000 or more must file an E.E.O.-1 report within 30 days of the award of a contract or subcontract. Further, affected contractors must develop a written affirmative action compliance program within 20 days from the commencement of a contract.

It was not until September 17, 1976 that O.F.C.C.P. published a notice of proposed rulemaking which included a brief reference to back pay as a remedy. 2/ At that time the agency claimed that the new regulations simply "codify O.F.C.C.P. policies regarding back pay and affected class relief which have been in effect for several years," *supra*. Then on January 18, 1977, that proposal was issued in final form, again with an explanation that it was simply a codification of current policy.

Thus, 12 years after the issuance of E.O. 11246, the O.F.C.C.P. decided that back pay was a valid remedy for violations of the rules and regulations made pursuant to E.O. 11246.

ISSUES

The central issue that has surrounded the entire Executive Order program is whether O.F.C.C.P.'s asserted right to pursue retrospective remedies under E.O. 11246, in the form of back pay and affected class relief, is authorized by statute, the Constitution, or the Order itself.

DISCUSSION

No single item involved in the Executive Order program has proved to be more controversial and litigious than O.F.C.C.P.'s asserted right to administratively order back pay awards to alleged affected class members. If this authority is valid and legal it must be premised on Executive Order 11246 itself, or independent authorization from the Congress or the courts. At various times, the O.F.C.C.P. has relied on a number of different theories of law to support its position. The courts have arrived at conflicting conclusions. The time is, therefore, ripe to make a thorough examination of the issues involved and to draw conclusions that will stand under ultimate review by the Supreme Court of the United States. It is the purpose of this memorandum of law to make the examination and draw those conclusions.

AUTHORITY FOR E.O. 11246

Under our constitutional form of government, in order for the Executive to validly exercise a power, he must demonstrate that he is acting with Congressional or Constitutional authority. This fundamental principle was enunciated by the Supreme Court nearly thirty years ago in Youngstown Sheet and Tube Co., v. Sawyer. 3/ In the plainest of language the Court found that "some constitutional or statutory authority must be found or an Executive Order is of no legal effect." Youngstown, supra. While never actually deciding whether E.O. 11246 meets the Youngstown test, the Supreme Court recently warned that "the origins of the congressional authority for Executive Order 11246 are somewhat obscure and have been roundly debated by commentators and courts." 4/

It is clear, nevertheless, that if it can be demonstrated that E.O. 11246 fails Youngstown, then it must follow that the attendant asserted back pay and affected class relief must also fail.

STATUTORY AUTHORITY

The government has advanced three statutory sources for a possible delegation of congressional authority to support E.O. 11246. They are (1) Title VII of the Civil Rights Act of 1964 (Title VII); (2) the Equal Employment Opportunity Act of 1972 (EEOA); and (3) the Federal Property and Administrative Services Act of 1949 (Procurement Act). At the outset it should be noted that none of these enactments contain a specific grant of authority to the Executive to regulate federal contractors' employment practices, and correlatively E.O. 11246 does not cite any statute as its basis.

CIVIL RIGHTS ACT OF 1964: TITLE VII

Frequently in law a novel defense of an action or policy suggests a weakness in the essence of the case itself. Probably the most novel defense advanced by O.F.C.C.P. for its back pay and affected class relief, has been to premise authority in Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972. The argument reasons that since Congress did not address the Executive Order program when it acted in 1964, and again in 1972, it intended to adopt that program. Such novelty suggests more than weakness.

To argue that two statutes that are retrospective remedially in nature can support an Executive Order that is clearly affirmative in nature, is to ignore the legislative history and the statutes themselves. During the longest debate in legislative history the House of Representatives specifically rejected Section 711(b) of H.R. 7152, which eventually became the Civil Rights Act of 1964. That Section provided:

> The President is authorized to take such action as may be appropriate to prevent the committing or continuing of an unlawful employment practice by a person in connection with the performance of a contract with an agency or instrumentality of the United States.

Chairman Celler, adopting the reasoning of the House Judiciary Committee Minority Report, argued on the floor of the House that such unlimited power in the Executive branch to prevent employment discrimination while performing government contracts would "encourage unlimited issuance of Executive Orders." 5/ Celler's amendment to delete the 711(b) language was passed by voice vote.

EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972

Again in 1972 Congress addressed the issue of enforcement powers in the equal employment field. It should be noted that the discussion centered generally on powers to be vested in the Equal Employment Opportunity Commission, (E.E.O.C.) and particularly on whether it should possess self-enforcing cease and desist powers. Senator Brock (R-TN) argued against any such open-ended power on due process principles. He noted that retrospective relief would be available only through Title VII, and that either remedy was available only through E.E.O.C. and the courts so that it would not be unlimited or coercive. In pertinent part Senator Brock said:

> The Equal Employment Opportunity Commission bill actually allows this regulatory Commission to put agents into the field who have the authority to go into a small business and say "Mr. I don't like what you are doing, it is discrimination, you are guilty, you are fined (back pay) and don't bother to plead innocent because there is no appeal, my decision is final." ...The Federal Government does not have the right to say to Americans, under any circumstances, that "you are guilty until proven innocent - and you have no appeal." Mr. President, I urge my colleagues to support the Dominick amendment which removes this regulatory power from the bureaucracy and puts it where it should be, with the courts. 6/

The Dominick amendment passed.

It is clear then, from the legislative histories of Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972, that Congress was not empowering the Executive to regulate federal contractors' employment practices. Both laws are silent in respect to the Executive Order program. However, they are very specific in their rejection of unchecked presidential power to enforce non-discrimination in employment by government contractors. Further, they reject back pay as a remedy without proof of discrimination under Title VII in a federal district court. This is in stark contradiction to O.F.C.C.P.'s asserted authority to exact that very remedy in an administrative enforcement proceeding, whether or not actual discrimination can be shown. The O.F.C.C.P. Compliance Manual, Section 7-130, provides for a formula approach to arriving at a back pay award premised on a theory that seeks to identify the present effects of past discrimination. This standard was categorically dismissed for Title VII purposes twice by the Supreme Court and once by the Sixth Circuit. 7/

Therefore, without the benefit of a specific grant of authority to the President to regulate federal contractors' employment practices in either Title VII or E.E.O.A.; and a denial of presidential authority to do so in 1964 and a rejection of the back pay concept as applied by O.F.C.C.P. in 1972, it would appear that the Executive Order program cannot derive its statutory basis from these acts of Congress.

Not to be deterred, however, O.F.C.C.P. has advanced the theory of "negative authorization." The theory runs that Congress in enacting the 1964 Civil Rights Act and amending that act in 1972 (E.E.O.A.) had the opportunity to address the contract compliance program. By its forebearance to act in reference to O.F.C.C.P. it gave implied authority negatively.

Syllogistically this limps at best. It is an attempt to prove a negative from unrelated action. Such is not rationally possible. Legally, the deduction was rejected by the Fourth Circuit Court of Appeals in the case of Liberty Mutual Insurance Co., v. Friedman. 8/ There the Court noted that "ratification" or "negative authorization" of the Executive Order cannot be found to flow from the rejection of several amendments in 1972 that were intended to circumscribe the role of the Executive Order program. The Court held that:

> Even if "ratification" by such a process might in some circumstances be properly found - a matter of some general dubiety when its potential effect upon the dynamics of the legislative process is carefully considered - we do not think it can be properly found here. The rejection in 1972 of a series of amendments which would have cut back the Executive Order program in existence at that time, cannot fairly be considered to contemplate a grant of authority to the Executive to extend the program...

Without discussing the very strong public policy reasons for rejecting ratification of any program by inaction, the Court directed attention to a law review note that addressed the theory in depth.9/ The article notes:

> The legislative process is designed to protect the notions of open and accountable procedures and majority rule as the fountain of democracy. For this reason the legislative process places the burden of passing bills by majority vote on the proponents of the particular piece of legislation. Under the theory of ratification by inaction, however, any unsuccessful attempt to defeat or modify the Executive Order program

> would be tantamount to an imprimatur of that program. Such a reading improperly shifts the burden of amassing a majority from the proponents to the opponents of the legislation. It may also cause serious opponents to refrain from open opposition if the result of unsuccessful opposition is ratification of a residential program. 10/

Thus, with this specific denial of negative ratification authority to the President to regulate federal contractors' employment practices in Liberty Mutual Insurance Co., supra, the last vestige of statutory authorization from Title VII and E.E.O.A. is removed.

FEDERAL PROPERTY & ADMINISTRATIVE SERVICES ACT OF 1949: PROCUREMENT ACT

Apart from those two enactments, the Executive Order program has been premised on the Procurement Act. This theory of law is the more common defense of E.O. 11246, and received its first serious judicial examination by the Third Circuit Court of Appeals. 11/

The 1949 Procurement Act was essentially a broad delegation of power from the legislative to the executive branch of the federal government for the purpose of consolidating procurement authority. The stated purpose of the Act was to provide "an economical and efficient" system for the procurement of property and services by the government. 12/ While never mentioning the regulation of discrimination in employment, it granted limited authority to issue Executive Orders that appeared "necessary to effectuate [its] provisions." 13/

It was not until 1971 that Executive Order 11246 nondiscrimination requirements were related to the Procurement Act of 1949 on the theory that there was a substantial federal interest in ensuring that the cost of federally-assisted construction projects would not be increased artifically by a restriction on the labor pool due to discriminatory employment practices. 14/ This reasoning was blindly followed until relatively recently when scholars and courts looked anew at the underpinnings of E.O. 11246. 15/

Since the statute grants no authority to regulate discriminatory employment practices, and the Order itself does not cite this or any other statute as its source for legislative authorization, the Executive power to issue the Order must be implied or it does not exist. 16/ The Courts have traditionally looked with disfavor on implied delegations of power, because basic statutory construction assumes that if Congressional intent exists, then Congress can make that clear to the Executive. Most recently in Pennhurst State School and Hospital v. Halderman, 17/ the Supreme Court took a close look at the line of cases from Contractors to Liberty Mutual and held that federal contracts and grants cannot be encumbered by extraneous conditions unless Congress has spoken "with a clear voice."

While Pennhurst dealt with the Disabled Assistance and Bill of Rights Act and not E.O. 11246, it is fair to infer from that case that a similar conclusion will be arrived at when the Court finally addresses the legality of the Order itself. The issue in Pennhurst was whether the stated strong national policy of placing mental patients in the "least restricted" environment could be a contractural condition to receiving federal funds for state mental hospitals, when Congress did not expressly provide for such a condition. In answering the question in the negative the Court said that if Congress "intends to impose a condition on the grant of federal moneys, it must do so unambiguously." 18/

Since all federal contracts, regardless of subject matter, are authorized by the Constitutional delegation of the "Spending Power" to the Congress in Article I, it follows that any redelegation of that power to the Executive must be clear and precise. Any other conclusion would violate fundamental principles of statutory construction and separation of powers. 19/

It follows then that under the Pennhurst ruling that the Procurement Act cannot serve as an underpinning for E.O. 11246. The Act not only does not speak "with a clear voice," but it is completely silent regarding the regulation of the equal employment practices of federal contractors. Such silence precludes the possibility of a delegation of power pursuant to the Pennhurst test.

Two other principal ways that Courts use to determine whether Executives are acting within properly delegated powers are whether the attempted act is contemporaneous with the promulgation of the alleged authority; and whether there is a "close nexus" between the attempted act and the requisite legislative authority. The first is a time or spacial test, and the second is a subject matter or content standard. In either, if the difference between the two items compared is significant then it will be presumed that a delegation of power was not intended.

As for the spacial test, dates become dispositive. The Procurement Act was passed in 1949, a full sixteen years before President Johnson issued Executive Order 11246. It was not until 1977 that back pay regulations were promulgated by O.F.C.C.P., explaining that the rules were simply a codification of existing policies. 20/

In General Electric Co., v. Gilbert, 21/ the Supreme Court discussed the varying degrees of deference that courts should afford administrative interpretations. In reference to whether a particular agency act was within the purview of the Congressional implementing statute, the Court cited "such factors as the timing and consistency of the agency's position, and the nature of its expertise." 22/ Applying this standard to Executive Order 11246 and its regulatory progeny, including back pay and other affected class relief, it becomes clear that the Order itself must fail. The time differential precludes any possibility of implying Congressional intent to control employment practices of federal contractors, especially since it was never mentioned in the Act. Further, E.O. 11246 is categorically inconsistent with the 1949 Procurement Act, which has as its stated purpose to provide for "an economical and efficient" system for the procurement of property and services by the government. In a single year compliance with the Executive Order program adds over one billion dollars to the cost of doing business with the federal government. 23/

The subject matter or content test was discussed at length by the Supreme Court in Chrysler Corp. v. Brown, supra. From that case, it is now clear that for E.O. 11246 to be valid due to implied authority from the 1949 Procurement Act there must be a "close nexus" between the Order and the Act. More specifically there must be that nexus between the incremental costs produced by compliance with the Executive Order program, and the directive to the Executive provided in the Procurement Act to obtain goods and services in a cost-efficient manner. Failing the "nexus" test of Chrysler the Order cannot stand.

The Chrysler standard simply says that implied Executive authority to act must bear a close relationship or "nexus" to "some delegation of requisite legislative authority." 24/ In the instant case presidential authority over the equal employment practices of federal contractors would have to be implied from the Procurement Act's presidential mandate to furnish "cost and efficiency" in government contracting.

Two cases intervened Chrysler and Pennhurst and specifically involved interpretations of the Procurement Act. In A.F.L.-C.I.O. v. Kahn, 25/ citing the Chrysler case the Court required the Executive Branch to show a "close nexus" between the mandated presidential obligations and the "efficiency and economy criteria" of the Procurement Act. Then in Liberty Mutual Insurance Co., supra, the Fourth Circuit Court of Appeals struck down the government's attempt to regulate the employment practices of an insurance carrier of a federal contractor. Again the decision turned on a failure to demonstrate a nexus between a Congressional delegation of authority and Executive action. It is clear that this holding was required by Chrysler in which the Supreme Court invalidated the Department of Labor's disclosure regulations under E.O. 11246.

There is no Supreme Court case which has specifically construed the Procurement Act's "cost and efficiency" language. However, similar language and a similar mandate were interpreted in N.A.A.C.P. v. Federal Power Commission. 26/ There the Court was deciding whether a Congressional delegation of authority to the Federal Power Commission to bring "economy and efficiency" to public utilities included executive authority to regulate the utility industry's employment practices. The Court held that the Executive Branch did not have such authority, and in fact went much further and said that the only power related to employment practices is limited by the "economy and efficiency" mandate to disallowing back pay and attorneys' fees awards if they are determined to be "unnecessary costs" after a finding of discrimination judicially or administratively.

It follows then that a similar lack of "nexus" exists for purposes of relating E.O. 11246 to the Procurement Act. It can be argued that the only authority given the Executive, and therefore O.F.C.C.P., is to disallow all back pay and affected class relief from the cost of doing business with the federal government.

The cost portion of the equation was discussed above. 27/ The conclusion is inescapable that the cost standard language of the Procurement Act does not support E.O. 11246. Further, the billion dollar annual cost of the Executive Order program factually militates against any other conclusion. 28/

A like conclusion can be made from experience regarding the "efficiency" standard of the Act. It would be most difficult to argue that the complex and duplicative Executive Order program has added anything of benefit to the government's procurement process. In terms of results, assuming that E.O. 11246 is valid, the government itself has questioned the efficacy of O.F.C.C.P. in bringing about improved employment conditions for women and minorities. 29/

In summary, the foregoing demonstratively shows that there is no statutory authority for the issuance of E.O. 11246, and that if authority exists it must be found in the Constitution.

CONSTITUTIONAL AUTHORITY

Having determined that President Johnson lacked Congressional authority to issue E.O. 11246 under any of the advanced legal theories discussed above, it becomes clear that if the Order is to stand it must be because of some Constitutional authority. Again, this is dictated by Youngstown, supra at 585 where the Court directed that the "President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." 30/

Youngstown requires that the power exercised, in this case regulation of the employment practices of federal contractors, be explicitly expressed in some Congressional legislation or derived from the Constitution itself.

Several Constitutional theories have been asserted, and with increasing frequency rejected by courts and scholars. Youngstown at the outset clearly forecloses any possibility that authorization for the Executive Order might be found independently of legislative sources in the "inherent powers" of the Executive that can be inferred from the general powers directly conferred on him by Article II of the Constitution. In that case the Supreme Court held that "inherent powers" derived from the Executive's Constitutional authority as Commander-in-Chief did not support the executive's order directing the seizure of the steel mills during the Korean conflict. The rationale for the holding centered on the fact that this was legislative action and in the absence of any delegation of lawmaking power by the Congress, none could be inferred from the President's Constitutional powers to see that the laws are faithfully executed. 31/ In Liberty Mutual Insurance Co., at 172, supra, the Fourth Circuit Court of Appeals relying on Youngstown, held that:

> Defendants acted outside any grant of legislative authority when they sought to impose the requirements of Executive Order 11246 upon plaintiffs. Without this critical connection to legislative authorization, defendants' action cannot be given effect.

Footnoting that holding, the Court ruled out any possibility that President Johnson was exercising inherent Presidential powers by stating that the "same reasoning (Youngstown) must apply to the lawmaking power clearly assumed in Executive Order 11246." 32/

The Executive power generated by the Constitutional directive that the President "faithfully execute" the law is dispositive of the issue of authority for E.O. 11246. 33/ Rather than supplying a Constitutional base for regulating federal contractors' employment practices by Executive Order, it clearly precludes any such action. This grant of authority empowers the President to enforce existing law, not to assume a lawmaking role. In a concurring opinion in Youngstown at 630, Justice Douglas discussed vesting of legislative powers and noted:

> The language of the Constitution is not ambiguous or qualified. It places not some legislative power in the Congress; Article I, Section I says 'all legislative powers herein granted shall be vested in a Congress of the United States...'

The power to enforce then is necessarily limited by the Congressional power to make laws, and in the absence of any delegation of lawmaking authority pursuant to statute, as discussed above, no authority for E.O. 11246 exists at all. As the Supreme Court said in Myers v. United States: 34/ "The duty of the President to see that the laws be faithfully executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave in his power."

The more general defense of the Constitutionality of E.O. 11246 is that the government can contract for goods and services with whomever it chooses and may impose any contractual obligations that it chooses. The case most commonly cited in support of this position is Perkins v. Lukens Steel Co. 35/ However, with a careful reading of the case it becomes manifestly apparent that the case has at best been mis-interpreted. While it does stand for the proposition that conditions can be imposed on federal contractors, the governmental power that this case refers to is a Congressional not an Executive power. It was not until A.F.L.-C.I.O. v. Kahn at 481 supra, that the Circuit of the District of Columbia reexamined the case, and decided that as it was used in the opinion, "the term 'Government' referred to Congress and not to the President. The power of the President to fix contract terms was not before the Court in Perkins." 36/

The final Constitutional theory advanced in support of executive authority over the employment practices of federal contractors is the equal protection theory. As originally enunciated, the Fifth Amendment to the Constitution imposes on the President a duty to contractually obligate federal contractors not to discriminate. Thus, it would be discriminatory state action violating the Due Process Clause to permit discriminatory employment practices by federal contractors. The argument assumes that the mere payment of federal funds pursuant to a federal contract is sufficient state action to invoke Due Process limitations on the government in the course of procuring goods and services. Or put differently, does payment of federal monies to discriminating federal contractors constitute discrimination on the part of the government?

In 1972 the Supreme Court answered the question in the negative except in those instances in which the federal government is in a "joint venture" with the federal contractor, and "significantly involved itself with invidious discriminations." 37/ In Jackson v. Metropolitan Edison Co:, 38/ the Court held that unless it can be shown that questioned governmental action with a federal contractor is such that "the action of the company may be fairly treated as that of the government itself", no Constitutional duty is imposed on the government for the private employment practices of the contracting company. It is now clear that due process obligations are not incurred simply by entering into a federal contract, and that the federal government is not affirmatively bound to avoid contracting with businesses that may be engaged in discriminatory employment practices. [39]

One conclusion is, therefore, unavoidable. The executive action taken by President Johnson in 1965 in the form of E.O. 11246 to regulate employment practices of federal contractors cannot be supported by statute or the Constitution. Consequently, the Order does not meet the Youngstown standard and can have no legal effect. Additionally, it must follow that the attendant asserted back pay and affected class relief must also fail.

AUTHORIZATION FROM E.O. 11246 FOR BACK PAY AND OTHER AFFECTED CLASS RELIEF

From the foregoing it is obvious that E.O. 11246 is an invalid exercise of Presidential power. However, since the Supreme Court has not accepted that issue for decision at this writing, and since O.F.C.C.P. has consistently ignored the issue by asserting its authority to exact back pay and other affected class relief, this final portion will examine the issue of E.O. 11246 authority. This exercise is simply argumentative, and cannot be taken as conceding the fundamental question as to the Constitutionality of the Order. Thus, for purposes of argument only, this section will assume that E.O. 11246 is valid. Having made that assumption, the issue becomes whether O.F.C.C.P. was vested with authority to seek back pay and other affected class relief by the Order.

There is no express provision in E.O. 11246 authorizing O.F.C.C.P. to obtain back pay or any other affected class relief. This absence of executive authority, and the lack of statutory and Constitutional support for the Order itself, including "negative ratification" as discussed above, stands as the most compelling argument against the existence of any such remedial power. This was recognized by the Fifth Circuit in United States v. East Texas Motor Freight System, [40] where it said, "nothing in the Order suggests an authority to direct retroactive seniority benefits to third party discriminatees." [41]

The remedial section of E.O. 11246, as set out below, is at all times prospective in nature, with no mention of individual relief. Subpart D, Section 209(a) of E.O. 11246 provides that the Secretary of Labor may:

> (1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

These are the exclusive powers vested in O.F.C.C.P. to deal with federal contractors who fail to comply with their contractual obligation relative to nondiscrimination and affirmative action. It was not until December 28, 1979, that O.F.C.C.P. first formally advanced Section 209(a) of the Order as a basis for back pay authority. In a preface to amendments to its regulations,42/ O.F.C.C.P. claimed:

> The Order also provides that a contractor may be debarred if it discriminates in employment [202(6), 209(a)(6)] and have its contracts cancelled, terminated or suspended [206(a), 209(a)(5)]. A contractor must satisfy the Secretary of Labor that

> it has brought itself into compliance with the Executive Order before it can be reinstated as an eligible bidder on Government contractors [sic]. [209(a)(b)]. Failure to provide back pay relief would preclude the contractor from being reinstated.
>
> Therefore, the requirement that back pay where appropriate must be provided for in a conciliation agreement is clearly consistent with Executive Order 11246.

However, it should be noted that the amendments did not claim that back pay was authorized by E.O. 11246, but rather that it was consistent with the Order and past policy.

Further, it does not follow that back pay authority is in anyway "consistent" with Sections 209(a)(5) and (6). They are sanction and penalty sections for noncompliance with the Executive Order, which do not define what constitutes a violation of the Order. Therefore, it cannot be understood to mean that "failure to provide back pay relief" constitutes a violation of E.O. 11246 that could be subject to sanctions. This is at best a non-sequitur. Since the language of Sections 209(a)(5) and (6) are silent in respect to monetary relief as a possible penalty, none can be implied.

The Eighth Circuit Court of Appeals examined the issue of monetary relief under E.O. 11246 in 1969. The case involved a federal employee who claimed that he had been the subject of employment discrimination due to his national origin, and was therefore entitled to damages. While the ultimate issue was whether the government's defense of sovereign immunity had been waived, the Court decided the question of a money claim against the United States under E.O. 11246. The Court held that "none of the Executive Order's language speaks in terms of money damages or of a money claim against the United States." 43/ This broad language makes it clear that the Court intended the holding to extend to all federal contractors, not just the federal government.

The language of 209(a)(5) and (6) is very specific as to sanctions and penalties. It does not confer any authority to draft additional penalties not contained in the Order, such as can be found in the National Labor Relations Act. 44/

According to settled rules of statutory construction a retrospective remedy cannot be read into the Executive Order's "Sanction and Penalty" section. 45/ In all respects the remedies provided in the Order to deal with noncomplying contractors are essentially different than back pay or any other backward-looking remedy. Back pay, by its very nature, is retrospective and private. On the other hand 109(a)'s sanctions of contract termination, suspension, or cancellation and debarment of contractors are prospective and are intended to protect public interests.

In Transamerica Mortgage Advisors v. Lewis, 46/ the Supreme Court, in deciding whether an individual cause of action existed under the Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-1 et seq. said:

> If monetary liability to a private plaintiff is to be found, it must be read into the Act. Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' 47/ Congress expressly provided both judicial and administrative means for enforcing compliance with § 206 ... [Here the Court reviewed the remedies provided by the Act.] In view of these express provisions for enforcing the duties imposed by §206, it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.' 48/

Therefore, it must be concluded that if O.F.C.C.P. continues to assert back pay as a proper remedy under the Executive Order, it cannot do so pursuant to §§ 209(a)(5) and (6). To read into a detailed and specific remedial statutory scheme an additional sanction not provided for, violates every tenet of accepted statutory construction.

O.F.C.C.P. has from time-to-time offered Sections 201 and 202 of E.O. 11246 as support for its back pay and affected class policies. Section 201 of that Order invests in the Secretary of Labor the authority to issue regulations "necessary and appropriate to achieve [its] purposes." It was not until 1971 that the Secretary issued Revised Order No. 4. The Order, it should be noted, did not cite Section 201 as authority, but simply required federal contractors to "remedy" the problems of affected classes. Then, in 1979, when O.F.C.C.P. amended its regulations, it claimed Section 201 as its basis for Revised Order No. 4. 49/

First, such reasoning must fail the "contemporaneous" test set down in General Electric Co. v. Gilbert, supra, herein discussed at page 8. Given the six years between the promulgation of E.O. 11246 and the "remedy" response of 1971, and the subsequent assertion of authority for that response in 1979, it is manifest that no deference is due that 1979 administrative interpretation under General Electric. Second, the assertion of authority cannot be implied from the language of E.O. 11246 by any application of rules of statutory construction. O.F.C.C.P. cannot lay claim to any penalty power that is not conferred by its own language, unless authority can be found elsewhere in the Order. 50/

The final claim to authorization from E.O. 11246 by O.F.C.C.P. for imposing back pay and other affected class remedies is Section 202. A duty on federal contractors to take affirmative action for purposes of assuring equal employment opportunities is imposed by Section 201(1). Section 202 (6) goes on to provide that in addition to sanctions authorized elsewhere, "such other sanctions may be imposed and remedies invoked as provided by rule, regulations, or Order of the Secretary of Labor, or as otherwise provided by law." O.F.C.C.P. over the years has taken these two parts of Section 202 to fashion three arguments in defense of its back pay authority, and to avoid the consequences of the "sanction" limitation holding in *Transamerica, supra*. That is since "sanctions" are limited to those found in the alleged authorizing act, O.F.C.C.P. sought to circumvent that holding and its progeny by asserting that back pay is a "remedy" not a sanction, or that it is "an element of affirmative action," and it is "appropriate relief." All three claims came in Federal Register pronouncements long after the issuance of E.O. 11246. 51/

The first such argument, the remedy theory, although rendered last in time, involves whether or not back pay is a remedy or a sanction. If it is a sanction then it must fail for the reasons set out in the discussion of 209(a), above, because it is not enumerated or contemplated in the Order at 209(a)(5) and (6) or elsewhere. Aware of that problem O.F.C.C.P. in 1979 advanced the proposition, first suggested in 1977 at 42 *Fed. Reg.*, supra, that back pay was a "remedy" not a sanction and, therefore, permissible under the broader language of 202(6). 52/ It relied on its own 1977 interpretation, above, which said that "individual relief is an affirmative step, which is required to eliminate discrimination at the subject establishment. It is remedial rather than punitive." This argument was finalized by O.F.C.C.P. in 1979.

However, it must fail on several counts. Simply by saying something is other than what it is cannot alter its essence. By calling a sanction a remedy it is not possible to change the prospective nature of the Executive Order program as opposed to the retrospective posture of Title VII, which specifically provides for back pay:

> The affirmative action covenant is no different in kind than other covenants specified in the invitation to bid. The Plan does not impose a punishment for past misconduct. It exacts a covenant for present performance. 53/

Such an interpretation cannot overrule *Transamerica, supra*, or ignore *United States v. East Texas Motor Freight System*. 54/ The Fifth Circuit in limiting Justice's enforcement authority under E.O. 11246 held in that case that any suit by the Department of Justice pursuant to the Order, "would necessarily be an action to enforce contract provisions by way of damages or an injunction, [when] nothing in the Order suggests any authority to direct [individual relief] to third party discriminatees." From this it becomes clear that any O.F.C.C.P. claim to back pay and affected class relief, must be tested under the broad grants of power contained in Section 202 of E.O. 11246. Since there is no explicit grant of back pay authority. and based on the limitations imposed on the "remedy" argument, as discussed above, Section 202 offers scant support for back pay authority in the Executive Order program.

The question remains whether Section 202 can support the other two arguments for Executive Order authority for back pay and other affected class relief. Twice, O.F.C.C.P. has attempted to argue that back pay is an "element of affirmative action" and that it is "appropriate relief." The most apparent weakness of these arguments is that on the two occasions when they were advanced O.F.C.C.P. offered no statutory, constitutional or Executive Order justification. 55/ Again, if such support does exist it must be based either on the general grants of power contained in the executive order or on independent statutory authority.

O.F.C.C.P. argues that back pay is an "element of affirmative action" because Section 202(1)'s mandate to take affirmative action includes "affirmative action to correct the effects of past discrimination." 56/ A reading of Section 202(1) manifestly demonstrates that the language of that Section indicates no such result.

> The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer, recruitment, or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

Interpreting Section 202(1) of the Order the Third Circuit in Contractors Association of Eastern Pennsylvania, supra, said:

> The affirmative action covenant is no different in kind than other covenants specified in the invitation to bid. The [Philadelphia] Plan does not impose a punishment for past misconduct. It exacts a covenant for present performance.

Additionally, "the perpetuation of past discrimination" theory, which was developed under the Civil Rights Act of 1964, was twice categorically dismissed by the Supreme Court as a correct interpretation of Title VII. In Teamsters v. United States; 57/ and again in United Air Lines v. Evans, 58/ the Court held that the plaintiff had the burden of proof to show that he or she had been discriminated against before recovery under Title VII could occur. Therefore, if, as O.F.C.C.P. argues, Title VII is the statutory authority for E.O. 11246 and its regulative issue, then the Teamster interpretation must apply to the Executive Order program. Thus, if 202(1)'s mandate does not include the duty to take affirmative action to correct the effects of past discrimination then a retrospective remedy cannot logically follow, and it cannot be "appropriate relief."

Further, it is not an "element of affirmative action," or "appropriate relief" under Section 202(6) of the Executive Order. Section 706(g) of Title VII does define a very broad concept of affirmative action that may be ordered by a federal court after a finding of actual discrimination as "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay." 59/ However, that definition of affirmative relief cannot be included within the meaning of the "Sanctions ... and remedies" language of Section 202(6). First, that Section is necessarily limited by Section 202(1) which is prospective in nature. Therefore, it must be assumed that sanctions under E.O. 11246 were intended to be prospective. Secondly, the two programs are qualitatively different, as discussed above, in that Title VII creates a private right to recover for actual discrimination, while the Executive Order program was created to protect the public interest in assuring a discrimination-free workforce for the future. This difference requires the application of the elemental statutory construction principle that the same words, when used in different statutes must be read "in the light of the mischief to be corrected and end to be attained." 60/ Since Title VII's goal is to provide a private cause of action for discrimination, and E.O. 11246 is intended to provide prospective relief, it must be concluded under this principle that the broader definition of affirmative action found in Title VII cannot fit into the more narrow confines of affirmative action as envisioned by President Johnson in promulgating E.O. 11246.

It is clear, also, that O.F.C.C.P. has eschewed the possibility that Section 202(6) authorizes back pay by its own action. By its 1977 rejection of back pay as a sanction, and opting to characterize it as a remedy to correct past wrongs, it must be assumed that it was distinguishing its authority from the broader Title VII affirmative action authority or it would be subject to Teamsters and United Air Lines rejection of the "perpetuation-of-past discrimination" theory. Therefore, taking all of the arguments together it must be finally concluded that Section 202 of the Order does not provide a reasonable basis for O.F.C.C.P.'s claim to back pay, and other affected class relief.

CONCLUSION

Affirmative action under Executive Order 11246, as it is applied today, is both illegal and unconstitutional. There is no statutory or Constitutional basis for its issuance. Assuming for purposes of argument only that the Order was properly promulgated, it cannot be considered by O.F.C.C.P. as a source of authority for back pay or other affected class relief. If affirmative action is to continue as a national policy, a new Executive Order or additional legislation is a priori. This will require a streamlined system that is in fact affirmative.

FOOTNOTES

1/ Executive Order 11375.

2/ 41 *Fed. Reg.* 40342.

3/ *Youngstown Sheet and Tube Co., v. Sawyer*, 343 U.S. 579 at 585 (1952).

4/ *Chrysler Corp., v. Brown*, 441 U.S. 281 at 304 (1979).

5/ H.R. Rep. No. 914, 88th Cong., 1st Sess. (1962).

6/ 1972 Legislative History at 841.

7/ *Teamsters v. United States*, 431 U.S. 324 (1977); *United Air Lines v. Evans*, 431 U.S. 553 (1977); *Mitchell v. Mid-Continent Spring Co.*, 583 F.2d 275 (1978).

8/ *Liberty Mutual Insurance Co., v. Friedman*, 639 F.2d 164 (1981).

9/ See, *Doing Good the Wrong Way: The Case for Delimiting Presidential Power Under Executive Order 11246*, 33 Vand. L. Rev. 921 (1980).

10/ *Doing Good the Wrong Way*: At 946, *supra*.

11/ *Contractors' Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, *cert. denied*. 404 U.S. 854 (1971).

12/ 40 U.S.C. § 471.

13/ 40 U.S.C. § 486(a).

14/ *Contractors' Association of Eastern Pennsylvania*, *supra*.

15/ See, *Eleishman and Aufres, Law and Orders: The Problem of Presidential Legislation, 40 Law + Contemp. Prob. 1*.

16/ *Chrysler Corp.*, *supra*.

17/ *Pennhurst State School and Hospital v. Halderman*, 49 U.S.L.W. 4363 (April 20, 1981).

18/ See, *Pennhurst* at 4367, *supra*.

19/ *Chrysler Corp.*, *supra*.

20/ 42 *Fed. Reg.* 3456, January 18, 1977.

21/ *General Electric Co., v. Gilbert*, 429 U.S. 125 at 141 (1976).

22/ *General Electric Co.*, at 141, *supra*.

23/ See, *Federal Paperwork: Its Impact on American Businesses*, published by the Comptroller General of the United States on November 17, 1978; *Cost of Government Regulation Study, The Business Roundtable*, published by Arthur Andersen and Company in March of 1979.

24/ *Chrysler Corp.*, at 304, *supra*.

25/ *A.F.L.-C.I.O. v. Kahn*, 472 F. Supp. 88 (D.D.C.), *reversed* on other grounds, 618 F.2d 784 (D.C. Cir. 1979, *en banc*).

26/ *N.A.A.C.P. v. Federal Power Commission*, 425 U.S. 662 at 669 (1976).

27/ See B.R.T. and G.A.O. studies, *supra*.

28/ See, Walker, *The Exorbitant Cost of Redistributing Injustice: United Steelworkers of America v. Weber*, 21 Bos. Col. L. Rev. 1, 75-78 (1979).

29/ See, *1 Report of the Commission of Government Procurement*, 112 (1972).

30/ *See Also*, Comment, *Executive Order 11246: Presidential Power to Regulate Employment Discrimination*, 43 Mo. L. Rev. 451, 476-77 (1978).

31/ See, *Youngstown* at 587, *supra*.

32/ *Liberty Mutual Insurance Co.*, Id.

33/ U.S. Const., Art. II §§ 3.

34/ *Myers v. United States*, 272 U.S. 52 at 177 (1926).

35/ *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

36/ For a broader discussion of the fact that Perkins cannot support the exercise of executive power over federal contracts, see *Brody*, *Congress*, *The President, and Federal Equal Employment Policy Making: A Problem in Separation of Powers*, 60 Bos, U.L. Rev. 239 (1980).

37/ *Moose Lodge v. Irvis*, 407 U.S. 163 at 173.

38/ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

39/ *Graphic Arts International Union v. N.L.R.B.*, 596 F.2d 904 (9th Cir. 1979); *Lestrange v. Consolidated Rail Corp.*, 501 F. Supp. 964 (M.D. Pa. 1980).

40/ *United States v. East Texas Motor Freight System*, 564 in *dictum* at 184 (1977).

41/ See also, *United States v. Trucking Management, Inc.*, No. 79-2102 (D.C. Cir. August 14, 1981).

42/ 44 *Fed. Reg.* 77,000 (Dec. 28, 1981).

43/ *Gnotta v. United States*, 415 F.2d 1271 at 1278 (1969).

44/ 29 U.S.C. § 160.

45/ 209(a)(5) and (6).

46/ *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11 at 19; 62L. Ed. 2d 146 at 155 (1979).

47/ *Botany Mills v. United States*, 278 U.S. 282 at 289 (1929).

48/ *Cannon v. University of Chicago*, 441 U.S. 560 at 742 (1979).

49/ See, *Fed. Reg.* 77,000 *supra*.

50/ See, *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Earnst and Earnst v. Hockfelder*, 425 U.S. 185 (1976).

51/ See, 44 *Fed. Reg.* 77002 (Dec. 28, 1979); 1975 Proposal, 40 *Fed. Reg.* 13,313; 42 *Fed. Reg.* 3454 at 3462 (Jan. 18, 1977).

52/ 44 *Fed. Reg.* 77002, *supra*.

53/ *Contractors' Association of Eastern Pennsylvania v. Secretary of Labor*, at 176, *supra*.

54/ 564 F.2d 184.

55/ See, *Fed. Reg.* (1975, 1977), *supra*.

56/ 44 *Fed. Reg.*, *supra*.

57/ 431 U.S. 324 (1977), *supra*.

58/ 431 U.S. 553 (1977), *supra*.

59/ 42 U.S.C. § 2000 e-5(g).

60/ *Commissioner of Internal Revenue v. Aluminum Co.*, 142 F.2d 663 at 668 (3d Cir. 1944), *cert. denied*, 323 U.S. 728 (1944).

VOLUNTARY LEADERSHIP IN A CHANGING WORLD

Chamber of Commerce of the United States
HUMAN AND COMMUNITY RESOURCES DIVISION
LABOR LAW SECTION
202-659-6104

1615 H STREET, N.W.
WASHINGTON, D.C. 20062

November 5, 1981

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human
Resources
United States Senate
Dirksen Senate Office Building
Room 4220
Washington, D.C. 20510

Dear Chairman Hatch:

Pursuant to your request, attached are the answers of the U.S. Chamber of Commerce to the written questions submitted for our response during the October 22, 1981 OFCCP oversight hearing.

Sincerely,

Robert T. Thompson

Robert T. Thompson

Enclosure

1. Q. Mr. Thompson, you've pointed out that OFCCP's requirements for written affirmative action are incredibly complex. Is it reasonable for a smaller contractor to be able to understand their requirements, let alone comply with them?

A. It is extremely difficult for a smaller contractor to understand the requirements for written affirmative action plans. When you add to this the arbitrary manner in which OFCCP compliance officers routinely interpret the requirements, a small contractor simply has no way of knowing whether he is in compliance or not.

These unfair burdens on smaller contractors are another example of how OFCCP enforcement of the Program frustrates its objectives.

2. Q. Mr. Thompson, do you have any evidence that OFCCP's administration and enforcement of the affirmative action program has actually helped achieve increased hiring and promotional opportunities for women and minorities?

A. On the contrary, we are aware of no evidence that shows that OFCCP's administration and enforcement of the program have advanced employment opportunities for minorities and women. In fact, OFCCP's primary focus -- in seeking retroactive relief and debarring allegedly noncomplying contractors -- emphasizes punishment and retribution rather than affirmative action. The attitude has been how many employers can we penalize rather than how can we advance employment opportunities for minorities and women.

3. Q. OFCCP contends their goals and timetables are not quotas. Do you agree?

A. As we pointed out in our statement, the distinction between goals and timetables and quotas is easily blurred. Because OFCCP's enforcement of the program focuses on numbers, and how those numbers are achieved, it is extremely questionable whether a contractor views them as anything other than quotas. Even though the program is intended to recognize the "good faith efforts" of contractors in meeting goals and timetables, in practice OFCCP has given little credence to these efforts.

4. Q. We constantly hear that OFCCP harrassment of contractors are isolated instances and can be corrected on an individual basis. As the representative of one of the largest business memberships in this country, could you tell us what has been the experience of your members?

A. Again, as we pointed out in our statement, the experience of our members shows that rather than being isolated, OFCCP's harassment of contractors and the arbitrary actions of its compliance are virtually universal. The comments from contractors cited in our statement are typical of those we receive on a routine basis.

5. Q. We hear that the business communities concern for regulator relief is a "paper smoke screen" for not wanting to press foreward with affirmative action efforts. Could you comment on that?

A. It has been the practice of OFCCP to view contractors with uniform distrust. In other words, the agency takes the view that but for its efforts, all contractors would intentionally discriminate against minorities and women and would do nothing to advance employment opportunities for these individuals.

This attitude is, unfortunately, light years behind reality. Contractors long since have come to recognize the value of advancing these opportunities and have for the most part undertaken voluntary efforts in varying degrees to achieve these objectives. Today it is simply a matter of good business sense.

The only smoke screen involved today is created by the fire which OFCCP has ignited in its unreasonable and arbitrary enforcement of the program.

The CHAIRMAN. Our next witness will be Mr. John Priest, corporate manager of employee relations of the Boeing Co., from Seattle, Wash.

Mr. Priest, we are happy to have you with us this morning. I have to apologize to you.

Senator Hawkins will be here in about 10 minutes to take over the chair, but I am going to ask my counsel to take over the chair until she gets here.

If she does not get here within that time, as soon as you are finished, my counsel will ask the questions that I would prefer to be asked here today and we will make this part of the record.

I think you understand that I have to be on that floor.

If you will forgive me, just proceed with your testimony. Mr. Florez will take it.

He will ask any questions before Senator Hawkins comes and, if necessary, will call other witnesses.

Thank you so much.

Without objection, we will put the statement of Senator Gordon Humphrey into the record as though fully delivered.

[Statement of Senator Humphrey follows:]

STATEMENT OF HON. GORDON J. HUMPHREY, A U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator HUMPHREY. Mr. Chairman, I regret that other committee responsibilities will prevent me from attending this morning's hearing on the Office of Federal Contract Compliance Programs. The oversight of these affirmative action programs is an important function of this committee and I look forward to reading the testimony of the witnesses at this morning's hearing.

The CHAIRMAN. Mr. Priest, you may proceed.

STATEMENT OF JOHN A. PRIEST, CORPORATE MANAGER, EMPLOYEE RELATIONS, THE BOEING CO., SEATTLE, WASH.

Mr. PRIEST. Thank you, Mr. Chairman. I understand your problems.

My name is John Priest. I am the corporate manager of employee relations for the Boeing Co.

I have been directly responsible for the Boeing Co.'s affirmative action program since 1967.

Boeing's credentials in this area stem from 1962 when Boeing was one of the first eight original signers of "Plans for Progress" which was a voluntary group of contractors who undertook to practice affirmative action before the Executive order became effective.

The Dreyfus fund which set up an investment fund for people who were interested in investing in companies with regard to their social responsibility, rated the Boeing Co. the highest among the aerospace companies which it considered. This was done in 1973.

My purpose in being here today is to do what I can to prevent the further illegal abuse of raw administrative power by the Office of Federal Contract Compliance.

The Boeing Co. has been subject to the Executive order since its inception in 1965.

From 1965 to 1978, the Boeing Co. underwent a minimum of 80 separate compliance reviews. In all of them, it was found to be in compliance with the Executive order.

In 1978, we ran into a confrontation with the Office of Federal Contract Compliance and the Department of Defense.

After about 4 months of negotiations over our 1978 plan, primarily in determining availabilities, without warning and without notice and without a hearing, the OFCCP and DOD withheld contracts over an 11-day period of some $366 million from the Boeing Co. and stopped some progress payments under existing contracts.

At that time we went into court in the U.S. District Court for the Western District of Washington, and obtained a restraining order preventing the holding up of these contracts and the payment of the progress payments.

That restraining order continues in effect to this day.

We had one other experience as late as December of 1980 when the OFCCP office in Kansas City attempted unilaterally to hold up a contract which the U.S. Air Force was about to award to the Boeing Co.

This time we did not have to go to court, but we called the OFCCP office and told them that their action was not only contrary to law but was contrary to the outstanding restraining order, and that if they did not retract their letter to the Air Force holding up our contract we would take action to place them in contempt.

Needless to say, at that point, they withdrew the letter to the Air Force.

Since 1978, we have had no problems in our relations with the OFCCP.

I am very much concerned that the new proposed regulations that have been issued for comment do not yet take care of providing contractors due process hearings in determining whether or not they may be in violation of the Executive order.

The new regulations provide for what is called an "Expedited Hearing," which as far as I am concerned is nothing more or less than a kangaroo court.

The proposed regulations do contain a full set of rules that do provide for a full due process hearing. They comply with the Federal Rules of Civil Procedure and the Administrative Procedures Act.

Therefore, I cannot understand why these regulations also contain this "Expedited Hearing" unless it is a deliberate attempt by OFCCP to continue to be able to deprive contractors of contracts without full due process hearings.

Accordingly, it is my strong recommendation that the "Expedited Hearing" provision of the present proposed regulations be eliminated.

The illegality of their withholding contracts without providing an opportunity for a full hearing is clear.

I have here for the record a list of court cases reaching this conclusion.

If you have time, I would like to read one quote from a hearing examiner who held a case under this "Expedited Hearing," just to show that the idea itself will not work.

If you have time I would like to do that; it is not too long.

Mr. **Florez**. Go right ahead.

Mr. **Priest**. This is a remark by Administrative Law Judge Robert J. Feldman in the decision he rendered in the case of *OFCCP* v. *Firestone*. This is his comment on the workability of the "Expedited Hearing." He did not even consider the due process problem. I quote:

> Thus, although no urgent needs had been shown for summary disposition and no reason has been advanced for preferring this case over numerous prior proceedings in which diverse minorities, females, and handicapped persons may be awaiting corrective action for discrimination they may have suffered, the ill-conceived and abortive time limitations of the expedited hearing procedure have been scrupulously observed.
>
> As a result and through no fault of the multiple counsel for the respective parties, we have a poorly prepared case, a record that is long on immaterial documents and short on cogent testimony, a diffuse presentation of facts and law, and, in all candor, a hasty decision.

That type of a hearing process just is not properly conceived to handle the complex demographic statistical information that can normally be involved in determining whether an affirmative action plan, as drafted, complies with the Executive order under the rules of OFCCP.

Therefore, I strongly recommend that if this committee can help in eliminating the concept of the "Expedited Hearing" from the proposed regulations, we would be a long way down the road to success.

Thank you.

Mr. **Florez**. Let me ask you a couple of questions that we had prepared for you.

You are the second company to come before the committee and say that OFCCP does not live up to its signed conciliation agreement.

It cost Prudential $1.5 million to prove that point.

About how much has Boeing spent on protecting itself from OFCCP's refusal to live up to its agreement?

Mr. **Priest**. I do not have an exact figure, but I am sure it is over $100,000.

Mr. **Florez**. In your testimony, you talk about the delay that you had in having your affirmative action plan approved. Was it because OFCCP refused to tell you what needed to be done in the compliance? Was it because they did not know what to advise you, or were they afraid to make a decision?

Mr. **Priest**. I think the issue came about because of rather arbitrary levels of availability which they were attempting to impose upon us in our affirmative action program.

Mr. **Florez**. That was the reason for the delay?

Mr. **Priest**. Right.

Mr. **Florez**. You state that Boeing has been unwilling to replace the restraining order with a settlement agreement because you need the protection. Could you elaborate on that point?

Mr. **Priest**. Fortunately, the restraining order prevents the Government from withholding contracts or canceling contracts or doing anything that would impair Boeing's eligibility for contracts until we have been given due notice and a "full hearing."

The reason we want to keep the restraining order in effect is that I am afraid of this "Expedited Hearing" because it is not a full hearing.

Under the restraining order, we are entitled to a full hearing; but under the regulations proposed, we might not.

Mr. **Florez**. We have a couple of other questions, but we will give them to you in writing. If you would get the answers back in writing within a week, we would appreciate it.

Mr. **Priest**. Fine.

Thank you very much.

Mr. **Florez**. Thank you.

[The prepared statement of Mr. Priest and responses to questions of Senator Hatch follows:]

STATEMENT OF JOHN A. PRIEST, THE BOEING COMPANY,

BEFORE THE U.S. SENATE LABOR AND HUMAN RESOURCES COMMITTEE

OCTOBER 22, 1981

MY NAME IS JOHN PRIEST. I AM CORPORATE MANAGER OF EMPLOYEE RELATIONS OF THE BOEING COMPANY AND HAVE BEEN DIRECTLY RESPONSIBLE FOR THE AFFIRMATIVE ACTION PROGRAM OF BOEING SINCE 1967. I APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE THE COMMITTEE AND HOPE THAT MY APPEARANCE WILL BE HELPFUL IN PREVENTING FURTHER ABUSE OF ADMINISTRATIVE POWER BY OFCCP.

AFFIRMATIVE ACTION BEGAN AT BOEING LONG BEFORE MY ARRIVAL IN 1967. BOEING WAS ONE OF THE EIGHT ORIGINAL SIGNERS OF "PLANS FOR PROGRESS," A VOLUNTARY AFFIRMATIVE ACTION UNDERTAKING BY FEDERAL CONTRACTORS IN 1962, PREDATING EXECUTIVE ORDER 11246 BY THREE YEARS.

THE DREYFUS FUND, IN EVALUATING AEROSPACE INDUSTRY COMPANIES WITH REGARD TO SOCIAL RESPONSIBILITY, IN 1973 RATED BOEING HIGHEST IN EQUAL EMPLOYMENT WHEN COMPARED TO OTHER AEROSPACE INDUSTRY COMPANIES CONSIDERED.

BOEING HAS EMPLOYED MINORITIES FOR MANY YEARS AS WITNESSED BY THE FACT THAT DURING A MAJOR EMPLOYMENT DOWNTURN, WHEN THE COMPANY'S TOTAL EMPLOYMENT DECREASED FROM 148,000 IN 1967 TO 56,000 IN 1971, ITS PERCENTAGE OF MINORITY EMPLOYEES WAS REDUCED BY ONLY 0.8% FROM 5.9% TO 5.1%. BECAUSE THE LAYOFFS WHICH OCCURRED DURING THIS PERIOD WERE BASED PRIMARILY ON LENGTH OF SERVICE WITH THE COMPANY, THIS MEANT THAT A SUBSTANTIAL NUMBER OF MINORITY EMPLOYEES HAD TO HAVE SIGNIFICANT LONGEVITY (UPWARDS OF 10 YEARS WITH THE COMPANY) TO HAVE PRODUCED SUCH A SMALL PERCENTAGE DECREASE IN MINORITY EMPLOYMENT.

WE FEEL, THEREFORE, THAT WE COME TO THIS HEARING WITH A WELL SEASONED COMMITMENT TO EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION. OUR STATISTICAL PROGRESS OVER THE PAST NINE YEARS, AS SHOWN IN EXHIBIT A ATTACHED, IS, WE BELIEVE, CONVINCING EVIDENCE OF THIS.

I AM HERE TODAY—BECAUSE OF A CONFRONTATION IN 1978 WITH THE AGENCIES ENFORCING EXECUTIVE ORDER 11246. I SHOULD EXPLAIN THAT I USE THE

PLURAL "AGENCIES" HERE BECAUSE IN 1978 TWO GOVERNMENTAL ORGANIZATIONS WERE INVOLVED, THE DEFENSE LOGISTICS AGENCY OF THE DEPARTMENT OF DEFENSE (DOD), UNDER THE GENERAL GUIDANCE OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP) OF THE DEPARTMENT OF LABOR.

BOEING HAS, OF COURSE, BEEN SUBJECT TO EXECUTIVE ORDER 11246 FROM ITS INCEPTION IN 1965 AND THE WRITTEN AFFIRMATIVE ACTION PLANS AND THE COMPLIANCE STATUS OF ITS MAJOR OPERATIONS WERE REVIEWED AT LEAST ONCE A YEAR BY DOD BETWEEN 1965 AND 1978, AND IN EACH YEAR PRIOR TO 1978 WERE FOUND TO BE IN COMPLIANCE WITH THE ORDER.

THE 1978 CONFRONTATION WHICH I WILL DESCRIBE IN SOME DETAIL RESULTED IN DOD/OFCCP UNILATERALLY WITHOUT NOTICE OR AN OPPORTUNITY FOR A HEARING, DEBARRING BOEING FROM THE AWARD OF SEVERAL IMPORTANT CONTRACTS. THIS WAS A CLEAR DEPRIVATION OF DUE PROCESS BY THESE AGENCIES AND IS THEIR SINGLE MOST SIGNIFICANT ABUSE OF ADMINISTRATION POWER. IT MUST BE STOPPED.

IN JULY 1977, FOLLOWING IMMEDIATELY UPON SUCCESSFUL COMPLETION OF THE 1977 ANNUAL COMPLIANCE REVIEWS, BOEING MADE ARRANGEMENTS TO MEET IN THE EARLY FALL WITH LOCAL (SEATTLE OFFICE) REPRESENTATIVES OF DOD TO DISCUSS THE FORMAT AND CONTENTS OF THE UPCOMING 1978 AFFIRMATIVE ACTION PLANS. SUCH A MEETING TOOK PLACE IN SEPTEMBER 1977 AND WE REQUESTED AT THAT MEETING THAT WE BE PROVIDED WITH DOD'S REQUIREMENTS FOR THE 1978 AAPS. THIS REQUEST WAS MADE BECAUSE IN PAST YEARS DOD'S REQUIREMENTS HAD VARIED IMMENSELY FROM YEAR TO YEAR AND IT WAS DIFFICULT, IF NOT IMPOSSIBLE, TO DRAFT AAPS ACCEPTABLE TO DOD WITHOUT SOME ADVANCE DIRECTION AS TO THEIR EXPECTED REQUIREMENTS. SUCH GUIDANCE WAS NEEDED IN THE EARLY FALL OF 1977 TO ALLOW SUFFICIENT TIME FOR PREPARATION FOR THE NEW 1978 AAPS PRIOR TO JANUARY 1978. AT THE SEPTEMBER 1977 MEETING THE DOD REPRESENTATIVES ADVISED THAT THEY WERE TO ATTEND A SPECIAL TRAINING SESSION IN NOVEMBER 1977 AND COULD PROVIDE NO GUIDANCE ON THE 1978 AAPS UNTIL AFTER THAT SESSION.

ANOTHER MEETING WAS HELD IN NOVEMBER 1977 AND SOME OF THE REQUESTED DIRECTION WAS PROVIDED BY DOD. THE REQUIREMENTS FOR THE 1978 AAPS

WERE RADICALLY DIFFERENT FROM THE PAST. FOR EXAMPLE, THE DETAIL REQUIRED FOR THE WORK FORCE ANALYSIS WAS INCREASED TO THE EXTENT THAT IT EXPANDED FROM 400 PAGES IN THE 1977 AAPS TO OVER 7,000 PAGES FOR THE 1978 AAPS, DESPITE THE FACT THAT THE COMPANY'S EMPLOYMENT INCREASED ONLY SLIGHTLY. IN ADDITION, NEW AND MORE DETAILED REQUIREMENTS WERE IMPOSED FOR AVAILABILITY ANALYSES AND GOAL SETTING TARGETS. THESE CHANGES REQUIRED REPROGRAMMING OF COMPANY COMPUTERS AT CONSIDERABLE EXPENSE.

ON JANUARY 23, 1978, FOUR WEEKS PRIOR TO THE ANNIVERSARY DATE OF THE 1977 COMPLIANCE REVIEW, THE FIRST OF THE COMPANY'S NEW 1978 AAPS WAS DELIVERED TO THE SEATTLE DOD OFFICE. SHORTLY THEREAFTER, ON THE 30TH, WE MET TO PROVIDE TO DOD, AT THEIR REQUEST, THE BACKUP AVAILABILITY DATA UPON WHICH THE AVAILABILITY LEVELS FIXED IN THE AAP WERE BASED. WE WERE ADVISED AT THAT MEETING THAT THIS DATA WOULD HAVE TO BE REVIEWED BY DOD'S LOS ANGELES REGIONAL OFFICE.

BY LETTER OF FEBRUARY 1, 1978 (EXHIBIT B), I REQUESTED A PROMPT REVIEW OF THE MATERIAL DELIVERED TO DOD ON JANUARY 30TH AND ASKED FURTHER THAT IF THE FINAL DECISION REGARDING THE SUBMITTED MATERIAL WERE DELAYED BEYOND FEBRUARY 23, 1978 (ANNIVERSARY DATE OF THE 1977 COMPLIANCE REVIEW) THAT THE COMPANY'S ELIGIBILITY FOR THE AWARD OF FEDERAL CONTRACTS BE EXTENDED FROM THAT DATE UNTIL THE FINAL DECISION WAS REACHED BY DOD PLUS A REASONABLE PERIOD BEYOND THAT TIME FOR THE COMPANY TO MAKE ANY CHANGES IN THE AAPS WHICH MIGHT BE REQUIRED BY THE DOD AS A RESULT OF ITS REVIEW OF THE AVAILABILITY DATA.

ON FEBRUARY 15TH AND 16TH FURTHER MEETINGS BETWEEN DOD AND THE COMPANY WERE HELD AND ON THE 16TH DOD TOLD THE COMPANY THAT THE AVAILABILITY DATA SUBMITTED WAS NOT ACCEPTABLE AND THAT AVAILABILITY COMPUTATIONS COVERING THE 142 JOB GROUPS WOULD HAVE TO BE RECOMPUTED. THE COMPANY REQUESTED THAT, RATHER THAN IT REVISING ALL 710 OF THE COMPUTATIONS INVOLVED, IT MIGHT BE MORE PRODUCTIVE IF DOD WERE TO SPECIFY THE CHANGES IN MINORITY AND FEMALE AVAILABILITY LEVELS IN THE 142 JOB GROUPS WHICH IT DESIRED. THIS WAS DONE BY DOD AT A

MEETING ON FEBRUARY 22, 1978. THE COMPANY'S RESPONSE TO DOD'S RECOMMENDATIONS, INDICATING THAT IT FOUND MANY OF THE PROPOSED AVAILABILITY FIGURES TO BE SET AT AN UNREASONABLY HIGH LEVELS, WAS CONTAINED IN THE COMPANY'S LETTER OF FEBRUARY 27, 1978 (EXHIBIT C), WHICH INCLUDED A COUNTER PROPOSAL BY THE COMPANY.

IN THE MEANTIME, ON FEBRUARY 23, 1978, THE DEADLINE ANNIVERSARY DATE FOR THE COMPANY'S CONTRACT AWARD ELIGIBILITY, A CONCILIATION AGREEMENT WAS SIGNED BY THE PARTIES. IT IDENTIFIED THE ITEMS AT ISSUE BETWEEN THEM AND EXTENDED THE COMPANY CONTRACT AWARD ELIGIBILITY TO MARCH 31, 1978.

THE COMPANY'S COUNTER PROPOSAL OF FEBRUARY 27, 1978 ON THE ISSUE OF AVAILABILITY LEVELS WAS REJECTED BY DOD BY LETTER OF MARCH 9, 1978 AND ON MARCH 13, 1978 THE COMPANY HAND DELIVERED A LETTER OF THAT DATE (EXHIBIT D) TO DOD REVIEWING THE CURRENT STATUS OF NEGOTIATIONS AND ASKED FOR A MEETING NOT LATER THAN MARCH 17, 1978 SO THAT FINAL AGREEMENT COULD BE REACHED ON THE ITEMS IN DISPUTE IN TIME FOR THE

AGREED CHANGES TO BE PHYSICALLY INCORPORATED IN THE AAPS PRIOR TO THE NEW MARCH 31, 1978 DEADLINE. THE COMPANY'S MARCH 13, 1978 (EXHIBIT D) LETTER ALSO REQUESTED THAT IT BE IMMEDIATELY ADVISED SHOULD DOD NOT AGREE THAT THE FEBRUARY 23, 1978 CONCILIATION AGREEMENT PROTECTED THE COMPANY FROM ANY ACTION BY DOD WHICH WOULD IMPAIR THE COMPANY'S CONTRACT AWARD ELIGIBILITY—WITHOUT DOD FIRST PROVIDING THE 15 DAY NOTICE AND OPPORTUNITY FOR A HEARING AS CONTAINED IN THE CONCILIATION AGREEMENT.

A MEETING BETWEEN THE PARTIES TOOK PLACE ON MARCH 17, 1978 AT WHICH FINAL AGREEMENT ON THE SUBSTANTIVE ISSUES WAS REACHED. HOWEVER, THE DOD REPRESENTATIVES AT THE MEETING WERE UNABLE TO STATE DOD'S POSITION REGARDING THE PROTECTIVE PROVISIONS OF THE CONCILIATION AGREEMENT.

THESE AGREEMENTS WERE REDUCED TO WRITING IN THE COMPANY'S COUNSEL'S LETTER TO DOD OF MARCH 21, 1978 (EXHIBIT E). THAT LETTER AGAIN OUTLINED CONCERN REGARDING DOD'S INTERPRETATION OF THE PROVISION IN THE

CONCILIATION AGREEMENT WHICH THE COMPANY FELT PROTECTED IT AGAINST INTERFERENCE WITH ITS CONTRACT AWARD ELIGIBILITY WITHOUT ITS BEING PROVIDED NOTICE AND AN OPPORTUNITY FOR A HEARING.

BY MARCH 24, 1978, NO RESPONSE HAD BEEN RECEIVED FROM DOD REGARDING ITS LOS ANGELES OFFICE'S INTERPRETATION OF THE CONCILIATION AGREEMENT SO THE COMPANY'S COUNSEL CALLED DOD'S SEATTLE OFFICE AND WAS ASSURED THAT NO ADVERSE ACTION WOULD BE TAKEN AGAINST THE COMPANY UNTIL THE AAPS TO BE SUBMITTED ON OR BEFORE MARCH 31, 1978 HAD BEEN REVIEWED BY THE SEATTLE DOD OFFICE AND THAT OFFICE HAS CONFERRED WITH THE COMPANY REGARDING THE AAPS. THIS ASSURANCE WAS CONFIRMED BY A LETTER FROM THE COMPANY'S COUNSEL TO DOD DATED MARCH 27, 1978 (EXHIBIT F).

ON MARCH 30, 1978 THE COMPANY SUBMITTED ITS REVISED AAPS IN ACCORDANCE WITH THE CONCILIATION AGREEMENT. THE FOLLOWING DAY, MARCH 31, 1978, THE COMPANY'S COUNSEL WAS ADVISED BY THE SEATTLE DOD OFFICE THAT, ALTHOUGH IT HAD NOT YET REVIEWED THE AAPS SUBMITTED, THE

COMPANY, AS OF THE CLOSE OF BUSINESS THAT DAY, WOULD BE INELIGIBLE FOR THE AWARD OF ANY NEW CONTRACTS AND INCREMENTAL FUNDING ON CURRENT CONTRACTS WOULD BE STOPPED.

DESPITE DAILY CONTACT BY THE COMPANY WITH DOD OFFICIALS IN SEATTLE AND LOS ANGELES IN AN EFFORT TO REVERSE THIS DE FACTO DEBARMENT, THREE PRIME DEPARTMENT OF DEFENSE CONTRACTS, IN A TOTAL AMOUNT OF $366,000,000 WERE WITHHELD BETWEEN APRIL 1, 1978 AND APRIL 11, 1978 WHEN THE COMPANY FILED SUIT IN THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AGAINST BOTH THE DEPARTMENT OF DEFENSE AND DEPARTMENT OF LABOR SEEKING A TEMPORARY RESTRAINING ORDER TO PREVENT THE WITHHOLDING OF THESE THREE CONTRACTS AND OTHERS SCHEDULED TO BE AWARDED BETWEEN APRIL 30, 1978 AND MAY 10, 1978 IN THE TOTAL AMOUNT OF AN ADDITIONAL $380,000,000.

A HEARING WAS HELD BEFORE A MAGISTRATE OF THE DISTRICT COURT ON APRIL 15, 1978 AND ON THE SAME DAY THE RESTRAINING ORDER WAS ISSUED BY THE COURT ORDERING THE DEFENDANTS TO RETRACT ANY COMMUNICATIONS

SUGGESTING THE COMPANY WAS INELIGIBLE TO RECEIVE AWARDS OF FEDERAL CONTRACTS AND ENJOINING ANY CONDUCT WHICH WOULD RENDER THE COMPANY INELIGIBLE FOR CONTRACTS PENDING FINAL AGENCY ACTION AFTER NOTICE AND FULL HEARING.

THE EFFECTIVE DATE OF THE RESTRAINING ORDER WAS EXTENDED BY THE COURT SEVERAL TIMES AND IS STILL IN EFFECT. SIMILAR RESTRAINING ORDERS COVERING SIMILAR SITUATIONS AND OTHER CONTRACTORS HAVE BEEN ISSUED BY SEVERAL FEDERAL COURTS THROUGHOUT THE COUNTRY BOTH BEFORE AND AFTER OUR ORDER WAS OBTAINED. AN OUTSIDE OBSERVER MIGHT CONCLUDE FROM THIS SERIES OF COURT CASES THAT OFCCP, HAVING BEEN CONSISTENTLY REBUFFED IN ITS ATTEMPTS TO IMPOSE SANCTIONS WITHOUT PROVIDING AN OPPORTUNITY FOR THE CONTRACTORS TO TELL THEIR SIDE OF THE STORY IN FULL HEARINGS WOULD HAVE FINALLY REALIZED THAT THE COURSE IT WAS FOLLOWING WAS ILLEGAL AND WOULD HAVE STOPPED THIS UNFAIR PRACTICE.

SUCH WAS APPARENTLY NOT THE CASE. AS RECENTLY AS DECEMBER 16, 1980 NEAR THE CONCLUSION OF A COMPLIANCE REVIEW BEGUN JUNE 1, 1980, OF THE

BOEING MILITARY AIRPLANE COMPANY, BASED IN WICHITA, KANSAS, THE REGIONAL OFCCP OFFICE IN KANSAS CITY, MISSOURI, ADVISED THE U.S. AIR FORCE AT BOTH TINKER A.F.B. IN OKLAHOMA AND WRIGHT PATTERSON A.F.B. IN OHIO THAT IT (OFCCP) WOULD NOT CLEAR BOEING FOR THE AWARD OF A PENDING CONTRACT WHICH THE AIR FORCE WAS ABOUT TO ENTER INTO WITH BOEING. THE DECEMBER 16, 1980 LETTER FROM OFCCP TO THE U.S.A.F. PROCUREMENT OFFICE AT TINKER A.F.B. IS ATTACHED AS EXHIBIT G. THIS WAS DONE UNILATERALLY BY OFCCP WITHOUT ANY NOTICE TO BOEING. BOEING FIRST LEARNED OF THE LETTER FROM THE U.S.A.F. PROCUREMENT OFFICE AT TINKER A.F.B. A FEW DAYS THEREAFTER AND IMMEDIATELY BY PHONE ADVISED THE KANSAS CITY OFCCP OFFICE THAT ITS LETTER CONSTITUTED A CLEAR VIOLATION OF THE OUTSTANDING RESTRAINING ORDER AND REQUESTED THAT IT BE RETRACTED. WE ALSO REQUESTED IN THAT PHONE CONVERSATION COPIES OF THE DECEMBER 16, 1978 LETTER AS WELL AS THE LETTER OF RETRACTION WHICH WE EXPECTED WOULD BE SENT BY OFCCP TO THE AIR FORCE.

SUCH A LETTER, DATED JANUARY 6, 1981, WAS SENT BY OFCCP TO THE AIR FORCE AND A COPY IS ATTACHED AS EXHIBIT H. HOWEVER, OUR REQUEST TO

OFCCP FOR COPIES OF THEIR LETTERS OF DECEMBER 16, 1980 AND JANUARY 6, 1981 TO THE AIR FORCE WAS NOT HONORED BY OFCCP SO WE FOLLOWED UP OUR PHONE REQUEST WITH A LETTER REQUEST, DATED JANUARY 9, 1981, COPY ATTACHED AS EXHIBIT I. OUR RECORDS SHOW NO RESPONSE BY OFCCP TO THAT LETTER.

FURTHER REQUESTS WERE MADE BY PHONE DURING JANUARY AND FEBRUARY, 1981 TO THE OFCCP IN KANSAS CITY BUT WITHOUT SUCCESS. CONSEQUENTLY, WE TRIED ANOTHER DIRECTION AND IN MARCH, 1981 ASKED OUR COUNSEL TO TRY TO OBTAIN COPIES OF THE OFCCP - AIR FORCE LETTERS THROUGH THE DEPARTMENT OF JUSTICE REPRESENTATIVE WHO WAS FAMILIAR WITH THE COURT PROCEEDINGS EXTENDING THE ORIGINAL RESTRAINING ORDER. HIS RESPONSE, DATED APRIL 15, 1981, WHICH FINALLY PROVIDED US WITH COPIES OF THE OFCCP LETTERS TO THE AIR FORCE AT TINKER A.F.B. AND REVEALED SIMILAR COMMUNICATIONS FROM OFCCP, KANSAS CITY TO THE AIR FORCE AT WRIGHT PATTERSON A.F.B. IS ATTACHED AS EXHIBIT J.

I AM PLEASED TO BE ABLE TO SAY THAT SINCE THEN, NO FURTHER ATTEMPTS HAVE BEEN MADE TO IMPAIR BOEING'S CONTRACTUAL ELIGIBILITY. DEPARTMENT OF JUSTICE REPRESENTATIVES HAVE INDICATED SOME INTEREST IN REPLACING THE CURRENT RESTRAINING ORDER WITH A SETTLEMENT AGREEMENT BUT BECAUSE OF OUR RECENT EXPERIENCE WITH OFCCP AT WICHITA WE HAVE DELAYED ENTERING SUCH AN AGREEMENT, FEELING THAT WE CONTINUE TO NEED THE PROTECTION WHICH THE PRESENT RESTRAINING ORDER PROVIDES.

WE HAD HOPED THAT THE NEW OFCCP REGULATIONS, PUBLISHED FOR COMMENT IN THE FEDERAL REGISTER OF AUGUST 25, 1981 WOULD CONTAIN A CLEAR, UNAMBIGUOUS STATEMENT THAT A CONTRACTOR'S CONTRACT ELIGIBILITY WOULD NOT BE IMPAIRED IN ANY WAY BY OFCCP WITHOUT THE OPPORTUNITY FOR THE COMPLETION OF A FULL AND FAIR HEARING WHICH COMPLIES IN ALL RESPECTS WITH THE DUE PROCESS REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURES ACT AND THE CONSTITUTION.

MY COMMENTS TO OFCCP ON THESE PROPOSED REGULATIONS ARE ATTACHED AS EXHIBIT K. ITEMS NO. 14 AND 35 OF THOSE COMMENTS DEAL WITH TWO SECTIONS OF THE PROPOSED REGULATIONS WHICH FAIL TO DO THIS.

ITEM NO. 14, DEALS WITH SECTION 60-1.69 WHICH CONTAINS SOME APPARENTLY INADVERTANT CONFUSION IN LANGUAGE WHICH CAN BE EASILY CLARIFIED.

ITEM NO. 35, HOWEVER, DEALS WITH A MUCH MORE SERIOUS SUBSTANTIVE ISSUE RAISED BY SECTION 60-30.31 WHICH PROVIDES FOR A SO-CALLED "EXPEDITED HEARING" WHICH, AS DESCRIBED IN SECTIONS 60-30.32 THROUGH SECTION 60-30.37, APPEARS TO BE AN ATTEMPT BY OFCCP TO EVADE THE CLEAR LANGUAGE OF EXECUTIVE ORDER 11246, ITSELF, WHICH, IN SECTION 208(B) STATES:

> "NO ORDER FOR DEBARMENT OF ANY CONTRACTOR FROM FURTHER GOVERNMENT CONTRACTS UNDER SECTION 209(A)(6) SHALL BE MADE WITHOUT AFFORDING THE CONTRACTOR AN OPPORTUNITY FOR A HEARING."

WITH THE EXCEPTION OF SECTIONS 60-30.31 THROUGH SECTION 60-30.37 WHICH DEAL WITH THE "EXPEDITED HEARING," PART 60-30 OF THE PROPOSED REGULATIONS PROVIDES THE USUAL ADMINISTRATIVE ENFORCEMENT PROCEDURE WHICH

APPEARS TO COMPLY WITH THE NECESSARY DUE PROCESS REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURES ACT AND THE FEDERAL RULES OF CIVIL PROCEDURE. THIS IS AS IT SHOULD BE AND OFCCP SHOULD BE SATISFIED WITH THIS, AS ARE OTHER FEDERAL ADMINISTRATIVE ENFORCEMENT AGENCIES. OFCCP'S DESIRE FOR SOME KIND OF AN ADDITIONAL SHORT CUT "EXPEDITED HEARING" WHICH FAILS TO PROVIDE TO THE ACCUSED CONTRACTOR ALL OF THE DUE PROCESS PROTECTION REQUIRED UNDER THE ADMINISTRATIVE PROCEDURES ACT, THE FEDERAL RULES OF CIVIL PROCEDURE AND, INDEED, THE CONSTITUTION ITSELF, RAISES A QUESTION AS TO OFCCP'S GOOD FAITH IN PROPOSING A PROCEDURE WHICH HAS ALL OF THE EAR MARKS OF A "KANGAROO COURT."

THE PROBLEM WOULD BE LESS SERIOUS IF THE PROPOSED "EXPEDITED HEARING" PROCESS WERE CONFINED TO SIMPLE FACTUAL TECHNICAL ISSUES SUCH AS A CONTRACTOR'S FAILURE TO ALLOW AN ON-SITE REVIEW TO BE CONDUCTED OR FAILURE TO PROVIDE ACCESS TO RECORDS CLEARLY RELEVANT TO THE CONTRACTOR'S COMPLIANCE STATUS. HOWEVER, TO APPLY THIS SHORT-CUT ABBREVIATED HEARING PROCESS TO SUCH KEY SUBSTANTIVE ISSUES AS TO

WHETHER (1) A CONTRACTOR HAS VIOLATED A CONCILIATION AGREEMENT OR (2) A CONTRACTOR HAS NOT ADOPTED AND IMPLEMENTED AN ACCEPTABLE AFFIRMATIVE ACTION PROGRAM MEANS THAT THE GREAT MAJORITY OF ENFORCEMENT PROCEEDINGS COULD BE CONDUCTED UNDER THIS PROVISION.

WHETHER OR NOT A CONTRACTOR HAS ADOPTED AND IMPLEMENTED AN ACCEPTABLE AFFIRMATIVE ACTION PROGRAM IS THE REAL CORE OF THE CONTRACT COMPLIANCE EFFORT. IT NORMALLY INVOLVES COMPLICATED DEMOGRAPHIC AND STATISTICAL ISSUES DEPENDENT ON COMPLEX AND INTRICATE MATHEMATICAL EVIDENCE IN VOLUMINOUS QUANTITIES, BOTH DOCUMENTARY AND IN THE FORM OF EXPERT STATISTICAL WITNESSES. IT IS THE EQUIVALENT IN COMPLEXITY TO FULL-BLOWN CLASS ACTION LITIGATION UNDER TITLE VII OR A SUIT UNDER THE ANTI-TRUST LAWS. COMMON KNOWLEDGE TEACHES US THAT THESE CASES ARE SELDOM COMPLETED WITHIN A FEW WEEKS TIME. AN ENFORCEMENT PROCESS WHICH, EXCEPT IN UNUSUAL CASES, PROVIDES ONLY 65 DAYS FOR PREPARATION BY THE ACCUSED CONTRACTOR AND 15 DAYS FOR THE HEARING ITSELF IS HARDLY ADEQUATE FOR THE DETERMINATION OF SUCH COMPLEX CASES WITH SUCH SERIOUS CONSEQUENCES.

THE "EXPEDITED HEARING" IS NOT ONLY SIGNIFICANTLY DEFICIENT IN DUE PROCESS PROTECTION FOR THE ACCUSED CONTRACTOR, IT JUST DIDN'T WORK SATISFACTORILY IN A CASE WHICH DIDN'T EVEN INVOLVE FACTUAL ISSUES OF DISCRIMINATIONS BUT DEALT SOLELY WITH RELATIVELY SIMPLE INTERPRETATIONS OF OFCCP REGULATIONS. THE FOLLOWING REMARKS OF LABOR DEPARTMENT ADMINISTRATIVE LAW JUDGE, ROBERT J. FELDMAN, IN HIS DECISION IN THE CASE OF OFCCP VS. FIRESTONE, THE PERTINENT PORTION OF WHICH IS SHOWN IN EXHIBIT L, ATTACHED, IS A SAD COMMENTARY ON HOW THE PROPOSED "EXPEDITED HEARING" PROCESS OPERATES IN PRACTICE:

"THUS, ALTHOUGH NO URGENT NEEDS HAD BEEN SHOWN FOR SUMMARY DISPOSITION AND NO REASON HAS BEEN ADVANCED FOR PERFERRING THIS CASE OVER NUMEROUS PRIOR PROCEEDINGS IN WHICH DIVERSE MINORITIES, FEMALES AND HANDICAPPED PERSONS MAY BE AWAITING CORRECTIVE ACTION FOR DISCRIMINATION THEY HAVE SUFFERED, THE ILL-CONCEIVED AND ABORTIVE TIME LIMITATIONS OF THE EXPEDITED HEARING PROCEDURE HAVE BEEN SCRUPULOUSLY OBSERVED. AS A RESULT, AND THROUGH NO FAULT OF THE MULTIPLE COUNSEL FOR THE RESPECTIVE PARTIES, WE HAVE A POORLY PREPARED CASE, A RECORD

THAT IS LONG ON IMMATERIAL DOCUMENTS AND SHORT ON COGENT TESTIMONY, A DIFFUSE PRESENTATION OF FACT AND LAW, AND IN ALL CANDOR, A HASTY DECISION."

OFCCP MIGHT SUGGEST THAT ONE POSSIBLE SOLUTION MIGHT BE TO REVISE THE PROPOSED REGULATIONS SO AS TO NARROWLY CONFINE THE "EXPEDITED HEARING" PROCESS TO EXTREMELY SIMPLE FACTUAL ALLEGATIONS OF TECHNICAL NON-COMPLIANCE. THE IDENTIFICATION OF SUCH CASES IS HOWEVER NOT A SIMPLE MATTER IN ITSELF AND THE QUESTIONABLE DUE PROCESS ASPECTS WOULD REMAIN.

IT IS THEREFORE URGED THAT THE ONLY SATISFACTORY SOLUTION IS TO ELIMINATE ENTIRELY FROM THE REGULATION THE CONCEPT OF AN "EXPEDITED HEARING" AND EXPECT OFCCP TO GET ALONG WITH A SINGLE ENFORCEMENT AND HEARING PROCEDURE WHICH IS ADEQUATE FOR THE TYPE OF ISSUES TO BE DETERMINED AND PROVIDES THE DUE PROCESS PROTECTION FOR CONTRACTORS UNDER EXECUTIVE ORDER 11246 TO WHICH WE ARE ALL ENTITLED.

(Note: In the interest of economy, the exhibits referred to in Mr. Priest's statement were retained in the files of the committee where the material will be available for research upon request.)

THE BOEING COMPANY

P. O. Box 3707
Seattle, Washington 98124

November 2, 1981
1-1802-JAP-7106

The Honorable Orrin G. Hatch
United States Senate
Committee on Labor & Human Resources
Washington, D. C. 20510

Dear Senator Hatch:

In answer to your letter of October 26, 1981, the following are my responses to the questions submitted:

1. Ques. You are the second Company to come before the Committee to say that OFCCP does not live up to its signed conciliation agreements. It cost Prudential 1.5 million to prove that point. About how much has Boeing spent on protecting themselves from OFCCP's refusal to live up to its agreement?

Ans. No detailed accumulation of costs has been maintained in this regard. However, a reasonable estimate would be a figure in excess of a hundred thousand dollars.

2. Ques. Am I correct in stating that the reason there was a delay in having your Affirmative Action Plan approved was because OFCCP refused to tell you what you needed to do to be in compliance? Is it because they didn't know what to advise you, or were they afraid to make a decision? How did Boeing Management feel about all this?

Ans. One of the reasons for the delays in the review of the 1978 AAP was the fact that OFCCP's requirements for the 1978 AAP were revised substantially when compared with the requirements for 1977 and this caused considerable confusion in interpretation for both the OFCCP and Boeing people. Such confusion, however, was not a new experience. Changes in the technical requirements for AAP's had been occuring, almost without exception, each year since the Executive Order was issued so that the lack of clearly defined standard requirements was something we were used to in varying degrees from year to year. The confusion and delays encountered in 1978 were just more frustrating to Boeing Management than in previous years.

3. Ques. Your testimony raises serious violation of due process by OFCCP. I find it alarming that such irresponsible practice should be allowed. Do you think OFCCP's new regulations will correct this problem? Do you think training of OFCCP staff is the answer?

Ans. No, as pointed out in Exhibit K of my written statement (my letter of September 23, 1981, to the OFCCP commenting on the proposed regulations), some minor revisions to Sec. 60-1.69 and complete elimination of all references to the "Expedited Hearing" process provided for in Secs. 60-30.31 through 60-30.37 are essential to assure contractors of due process protection. Staff training is not the answer as long as the regulations leave the door open for OFCCP to cut corners.

4. Ques. You state that Boeing has been unwilling to replace the restraining order with a settlement agreement because you need the protection. Could you elaborate on that point?

Ans. There are two reasons for our reluctance to relinquish the restraining order. The first is our experience in December, 1980, when, more than two and a half years after the order was issued by the District Court, the OFCCP Kansas City office attempted, in clear violation of the court order, to impair our contract eligibility without notice or hearing. The second is that the restraining order provides that our eligibility for contracts is not to be impaired without our having the opportunity for a "full" hearing. So long as the OFCCP regulations contain provisions for any kind of a short-cut "kangaroo court" type of hearing such as the "Expedited Hearing" referred to in the answer to Question 3, above, we are apprehensive that, should the occasion arise, OFCCP might provide less than the "full" due process hearing specified in the restraining order.

5. Ques. In your opinion, why has Boeing been subjected to annual reviews over the past 13 years which encompasses over 80 compliance reviews? Is it because a rash of employment discrimination claims have been filed against your Company? Or why else?

Ans. In my opinion, Boeing has been subject to annual compliance reviews primarily because of its size, both as a major defense contractor and a major employer in the State of Washington and elsewhere where it has operating locations.

6. Ques. From your experience with OFCCP over the years, what is the Agency most concerned with?

Ans. In my experience OFCCP has been primarily concerned with rigid technical compliance with the letter rather than the spirit of its regulations.

7. Ques. You stated that resolution of the enforcement proceeding was delayed because OFCCP was in the process of changing its regulations. Because you have been working closely with OFCCP since the office was established in 1967, does the agency frequently change its regulations? Has there ever been a time when OFCCP officials have not had the regulations under review?

Ans. This has been covered in the answer to Question 2, above. Not only has it been difficult to keep up with OFCCP's constantly changing regulations, but perhaps of more practical concern to contractors has been the problem of following the wide ranging differences in interpretation of an identical provision of the regulations by different OFCCP offices and even different individual OFCCP agents.

Very truly yours,

John A. Priest
Corporate Manager of
Employee Relations

Mr. **Florez.** Mr. Robert Baumann of Mead Corp. is our next witness.

STATEMENT OF ROBERT W. BAUMANN, VICE PRESIDENT OF HUMAN RESOURCES, MEAD CORP., DAYTON, OHIO

Mr. **Baumann.** Thank you.

One of my contemporaries asked me this morning as I was approaching the hearing how it was that a paper company could not be in full support of the OFCCP in view of the blizzard of paper they create. It is a problem for us I will admit. [Laughter.]

My name is Robert Baumann. I am the corporate vice president of human resources for Mead Corp.

Mead is a diversified forest products company with corporate headquarters in Dayton, Ohio. Our annual sales volume approaches $2.8 billion, and we employ approximately 25,000 men and women in over 140 locations nationwide.

I think it is important to establish at the outset that Mead is not a major Government contractor nor have we ever been cited for a significant deficiency by the OFCCP.

We are committed to our moral responsibility to comply with both the letter and the spirit of title 7 of the Civil Rights Act to insure equal employment opportunity for all.

Further, we endorse the concept of voluntary affirmative action and appropriate monitoring by the Federal Government of our progress toward self-imposed objectives.

Today I would like to share two recent experiences of our company with the OFCCP to illustrate what we believe is a misdirected use of their power and responsibility.

We hope these examples will illustrate how a valid national objective has become mired in a proliferation of agency regulatory detail.

Both instances involve a routine compliance review—not the result of a complaint or alleged discriminatory practice.

Also, in both instances, there was no finding of significant discrepancy in our practices or our affirmative action plan as a result of review.

There was, however, an unwarranted and sustained adversarial posture on the part of OFCCP resulting in unnecessary time and cost incurred by my company in defending itself.

The first instance occurred in Butner, N.C., a manufacturing facility of about 114 people.

In July 1980, the plant received a notice of a routine audit of its affirmative action plan by the OFCCP. This was the first in a series of 32 contacts over an 11-month period of time.

The area OFCCP Director, in a letter received June 11 of this year, granted final approval of our affirmative action plan and noted there were no apparent deficiencies.

The months in between are illustrative of the frustration we have experienced in trying to cooperate with the OFCCP.

The initial request for data was complied with within 20 days. Shortly thereafter, an additional request was made for extensive compensation data, and this was followed by still a third request for a three-page list of personal history and employment data.

Robert Beck of the Prudential Insurance Co. has previously testified to this committee on a disagreement with the agency on the scope of discovery.

Unlike Prudential, we agree to make all of the requested data available for an onsite audit. We also agree to permit records to be carried offsite with appropriate assurances of confidentiality.

I am advised by counsel that our request for confidentiality was consistent with established case law. Furthermore, OFCCP had previously guaranteed the confidentiality of data to other contractors, including the University of California at Berkeley and Prudential. However, they refused to do so for Mead.

To put this in proper perspective, refusal of the OFCCP to guarantee confidentiality was not the action of an individual equal employment opportunity specialist.

We pursued this issue first with the area Director, then with the regional Director, and finally with the Assistant Solicitor of Labor in Washington.

At each step, we reconfirmed our willingness to provide all of the requested data subject to proper restrictions.

After 6 months of confrontation on the confidentiality issue, including a written threat of enforcement proceedings unless Mead capitulated, OFCCP did finally conduct the audit. They did not find the need to carry a single record offsite. Only minor deficiencies were noted, all of which we immediately agreed to correct.

OFCCP's compliance manual prescribes a letter of commitment for minor deviations of this type. Instead, and perhaps predictably, OFCCP sought a full conciliation agreement under which we would waive what we consider our future rights to due process. A conciliation agreement, as you know, is intended to apply to major serious deficiencies.

A letter of commitment was finally signed after another 4 weeks of debate and thus the *Butner* case came to a close.

The important point here is that this was only a routine audit and not the result of an alleged wrongdoing, nor did the audit result in a finding against us.

It did result in Mead spending hundreds of hours and thousands of dollars with absolutely no public policy benefit.

Lest one conclude that our experience with the OFCCP in *Butner* is an isolated incident, I would also like to briefly share another recent experience in two of our Chicago plants.

In May of 1980, one of our Chicago manufacturing facilities was selected for a routine compliance review. As in the *Butner* situation, the audit was not the result of an alleged wrongdoing on our part. The conclusion of this audit was a finding of three minor deficiencies which we immediately agreed to correct and promptly signed the usual letter of commitment.

On August 20, the Chicago OFCCP office formally accepted our affirmative action plan, and the matter was closed in a conciliatory manner.

This committee has heard much testimony on the eight factors required by the OFCCP to be considered in determining statistical availability of minorities and females.

Without adding to the dialog on the relevance of the eight factors, suffice it to say that Mead has established a standard methodology for use at all of our locations to assure consideration of each factor for each individual job at each location.

In addition, we have gone to a great deal of effort and incurred over $70,000 of expense to train approximately 150 Mead personnel specialists in the application of this methodology.

The first Chicago plant audit included a review of the methodology to assure consideration of the eight factors.

On August 20, we had every reason to believe that our methodology was acceptable since the plan that resulted from it was acceptable.

Not so. Three weeks later, a different compliance officer from the same OFCCP office conducted a routine audit at a second Chicago plant. As you may have anticipated, he found the methodology to be unacceptable.

We pointed out that the identical methodology had gotten a clean bill of health in a number of recent audits, including one by the same office within the prior 30 days.

To our amazement, the compliance officer proposed to correct this inconsistency by having the prior approval rescinded, a threat repeated by her supervisor at an office conference a short time later.

On October 14, we contacted the OFCCP to set up a second conference in an effort to find a mutually acceptable solution. They agreed to the conference. Then to our surprise and disappointment, they issued a show cause order the same day.

Three weeks later we unexpectedly received notification of approval of the affirmative action plan and the rescinding of the show cause order. Not all of our experiences with compliance reviews have been as difficult as these two experiences, but neither are they the infrequent exception.

These examples illustrate what we believe to be a fundamental philosophy and role perception by the OFCCP that cannot be dismissed simply as the results of poor training or agency mismanagement.

I would like to offer five suggestions for your consideration in refocusing OFCCP to its proper role:

First, reaffirm OFCCP as the appropriate agency to monitor the employment practices and affirmative action efforts of Federal contractors in the attainment of voluntary, self-imposed objectives. This role would permit seeking voluntary prospective letters of commitment or gathering supporting evidence concerning alleged discriminatory employment practices.

Second, transfer all enforcement actions from the Department of Labor to the Justice Department or to the Equal Employment Opportunity Commission, as appropriate.

Implied in this suggestion is complete removal of conciliation agreements, disbarment, and backpay authority from the OFCCP to the appropriate enforcement agency.

Third, provide specific regulations governing the scope and performance of compliance audits to prevent extensive fishing expeditions by the agency in the absence of alleged or apparent discriminatory practices.

Fourth, establish comprehensive regulations to protect the privacy of individuals and confidential competitive data provided to the OFCCP in conjunction with a compliance review.

And, finally, mandate a fundamental change in OFCCP philosophy to focus on enhancing opportunities for women and minorities rather than a further retreat into the quagmire of statisticalization.

Affirmation action should be just that—a positive forward momentum to provide equal access for all citizens to the rewards of personal effort.

The present real world activities of the OFCCP as the self-selected adversary to business cannot be expected to unleash the innovative and creative efforts required to meet our national social goals.

Thank you, Mr. Florez, for the opportunity to comment.

Mr. **Florez**. Thank you, Mr. Baumann.

We do have some questions, and I would like to just ask you a couple of them which I think are important.

With respect to the North Carolina investigation, why was OFCCP and the Solicitor's Office unwilling to protect the confidentiality of your personnel records?

Mr. **Baumann**. We asked that very same question a number of times. The only answer I can give you is that we do not know. They never advised us what the basis was.

Mr. **Florez**. It seems to me it is not cost-effective for the Government to spend 11 months reviewing your North Carolina facility with 32 contacts when all you have is 114 employees. Did this review force you to hire more women and minorities or help you to increase your commitment to affirmative action?

Mr. **Baumann**. No.

Mr. **Florez**. What rationale did OFCCP give you for rescinding approval for your first facility?

When they served you with a show cause order without prior warning, what was their reason for doing so?

Mr. **Baumann**. We do not know; they would not respond to us when we requested a reason.

Mr. **Florez**. What do you mean when you say that the fundamental philosophy and self-perception of the OFCCP cannot be dismissed simply as a result of poor training or agency mismanagement?

Mr. **Baumann**. OFCCP has a 15-year history that is remarkably resistant to a succession of directors, revisions of regulations, and so forth.

The proposed regulations, I think, are a good case in point. While much mass has been presented in the data, I think a careful examination of the proposals really gets down to very few substantive changes. Perhaps the only substantive change is to relieve some small contractors of the onus of extensive statistical compilations—as far as their affirmative action plan is concerned.

For a major contractor, my interpretation is that it not only does not provide relief but in fact even narrows the corridor for decisions.

I would like to use one or two examples if I might to support that point.

It seems that there are two kinds of actions that are available to us—either voluntary or mandated numbers.

If it is the intent of Congress to mandate absolute numbers, then the numbers should be mandated and we should get on with it.

We seem to be practicing a charade in which presumably some judgments are made by contractors. However, in fact, the band of judgment available to us is very narrow.

In a recent compliance audit, we found ourselves in a prolonged discussion with the compliance officer on which specific colleges we recruited at. The compliance officer felt it was important for us to recruit at several named colleges.

This is in spite of the fact that we have a self-imposed objective of hiring more than 50 percent of our campus hires, either women or minorities.

That seemed to make no difference in the process, because we did not recruit at named colleges.

A second example might be the matter of job grouping.

The OFCCP manual provides, as an example, that a job grouping be comprised of 50 or more people.

In a recent compliance audit—one, in fact, that is still underway—the compliance officer has concluded that our job grouping of 111 people is too big.

Apparently, Mr. Florez, the magic number is someplace between 50 and 111. I am not sure how we determine what exactly that number is.

I think these are illustrations of a propensity on the part of investigators to be very, very precise and very restrictive and very narrow in their interpretation of the actions that are available to a contractor.

Again, I would point out that we are dealing, in our case, with a contractor that is neither a major Government contractor nor are we a contractor that has ever had any substantive finding against us.

Mr. **Florez**. Thank you, Mr. Baumann.

Mr. **Baumann**. Thank you.

[Responses of Mr. Baumann to questions of Senator Hatch follows:]

QUESTIONS AND ANSWERS FOR MEAD CORPORATION - ROBERT W. BAUMANN

1. Q: With respect to the North Carolina investigation, why was OFCCP and the Solicitor's office unwilling to protect the confidentiality of your personnel records?

A: We asked that very same question a number of times. The only answer I can give you is that we do not know. The OFCCP never advised us of the basis for its decision.

2. Q: What did OFCCP want the Butner facility to agree to in its proposed conciliation agreement? Did these demands specificially relate to the minor deficiencies found during the review?

A: The specific issue in the proposed conciliation agreement was that we not only agree to the remedial actions proposed but to any and all future remedies the OFCCP might unilaterally insist on in the future. In effect, we were asked to sign a blank check, waiving our legal right to due process on any future demand of the agency.

3. Q: Mr. Baumann, it seems to me it is not cost effective for the government to spend eleven months reviewing your North Carolina facility with thirty-two contacts when all you have is 114 employees. Did this review help you or force you to hire more women and minorities, or help you to increase your commitment to affirmative action?

A: No.

4. Q: When they asked you the third time for three pages of additional data, did they tell you why they wanted more data, and do you know what they were looking for?

A: No, they did not. Since there had been no complaint or alleged misconduct on our part, the second and third request had all of the appearances of a "fishing expedition".

5. Q: During the review of your second plant in Chicago, what rationale did OFCCP give you for rescinding approval of your first facility? When they served you with a show cause order without prior warning, what was their reasoning for doing so?

A: First, to keep the record straight, the approval of the first Chicago plant's AAP was never actually rescinded. We were twice-threatened with having approval rescinded but the threats were never carried out. Our conclusion is that they were an attempt to have us abandon our defense of the methodology used. One of the frustrations in dealing with this agency is that reasons are seldom given for actions on their part which seem capricious or at least inconsistent with past practice.

QUESTIONS AND ANSWERS FOR MEAD CORPORATION - ROBERT W. BAUMANN

5. A: (continued)

OFCCP also did not give a reason for issuing a show cause order without prior warning. We do not know what their motives may have been.

6. Q: Is it common practice for OFCCP compliance officers to refuse to be bound by the agency's prior commitments? I raise this because Prudential and Boeing have had to expend unreasonable time and money to prove OFCCP does not honor its commitments. This is outrageous!

A: Our experience in Butner suggests the agency does not feel bound by Congressional intent, case law or prior agency commitment and precedent. I believe it would be a mistake to dismiss this as the action of an individual compliance officer. The refusal to grant confidentiality in Butner, as I previously testified, was pursued with the individual compliance officer, the area director, the regional office and, finally, the assistant solicitor in Washington, D. C. At each step, our citation of case law and prior practice was dismissed without any reason being offered. We believe this is characteristic of the agency rather than an isolated instance.

7. Q: What do you mean when you say, "The fundamental philosophy and self-perception of the OFCCP cannot be dismissed simply as the result of poor training or agency mismanagement?"

A: OFCCP has a 15 year history of performance that is remarkably resistant to the efforts of a succession of directors, revisions of regulations, etc. The current proposed regulations are a good case in point. The agency appears to be presenting the proposals as massive when, in fact, a careful examination reveals very few substantive changes. Perhaps the only one of note relates to small contractors being relieved of some of the onus of expensive, statistical compilations. A major contractor, in my interpretation, is not only not provided relief but, in fact, is given an even narrower corridor for decisions. I would like to use one or two examples to support that point.

There are two ways of arriving at numerical goals for minority and female representation within job groups, voluntary or mandated. If it is the intent of Congress to mandate absolute numbers, then we should get on with it. We seem to be practicing a charade in which, presumably, some judgements are made by contractors in arriving at objectives. In fact, the band of judgement available to us is very narrow. In a recent audit, we found ourselves in a prolonged discussion with the compliance officer on his insistence that we recruit at specific minority colleges despite the fact that we have a self-imposed objective of employing more than 50% minorities and females in our campus hiring programs. That ambitious objective appeared to make no difference to the compliance officer because we are not recruiting at colleges he preferred.

QUESTIONS AND ANSWERS FOR MEAD CORPORATION - ROBERT W. BAUMANN

7. A: (continued)

A second example is the matter of job group. The OFCCP manual provides that a job group be comprised of 50 or more people. In a recent audit, the compliance officer concluded that one of our job groupings of 111 people was too large. Apparently, the magic number for a job group is somewhere between 50 and 111, regardless of whether or not it makes sense.

I think these two examples illustrate a propensity on the part of investigators to be very, very precise, restrictive, and narrow in their interpretations of the actions that are available to contractors.

The entire thrust of OFCCP appears to be towards attaining some absolute statistical parity within each job, job group, location, pay range, and organizational unit of government contractors. In my view, it is time to abandon the statisticalization of the employment process and move on to the creation of opportunities for minorities and females to fully participate in all of our national institutions; business, labor and government.

Mr. FLOREZ. Senator Williams will now take over.

However, there is one part of the chairman's statement that I did want to read which is important for announcing this next set of hearings.

It says this:

> After today's hearing, we will move to two other hearings. These will be regarding the solutions and will entertain the following questions.
>
> If we still believe we should pursue the national goal of improving opportunities for women and minorities, how can we best realize that goal?
>
> What programs and policies should we develop?
>
> What should be the proper role of Government, the private sector, and other groups in furthering this national goal?
>
> We will be inviting you at our next hearing to come forth with solutions.

Senator WILLIAMS [acting chairman]. We will be pleased now to call on the League of United Latin American Citizens, Mr. Arnold S. Torres, the national executive director.

We welcome you and look forward to your statement.

STATEMENT OF ARNOLDO S. TORRES, NATIONAL EXECUTIVE DIRECTOR, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, WASHINGTON, D.C.

Mr. TORRES. Thank you, Senator.

Before we begin, I would like to extend our apologies to the subcommittee staff and to Mr. Florez, specifically, for any problems we may have presented to them in preparation for this hearing in view of the lateness of our testimony.

We had significant time problems, and had other testimony that had to be prepared. We apologize and extend our appreciation for being invited to testify before you today.

We would like to have our statement submitted for the record and also request of the committee to hold the record open for a day as we would like to submit additional comments along the lines of what our initial testimony presents you with.

Senator WILLIAMS. Your full statement will appear in the record at the completion of your oral presentation, and we will keep it open for further comments.

Mr. TORRES. Thank you very much.

You have heard from three previous witnesses a very strong line of criticism for the manner in which OFCCP has carried out its responsibilities.

We take notice of comments that were made earlier today by the chairman in which he indicated that the Office of Federal Contract Compliance does not measure good faith efforts and there is really no record of whether, in fact, there has been an increase in the hiring of minorities and women by many of these companies that are being forced to comply.

I guess at least that is the contention by these companies and representatives and that there are a number of other problems. We believe that comes down to the overzealous enforcement of many of these regulations.

In addition, there are some regulations that probably do provide somewhat of a disincentive for compliance. However, let us look at some of the results that we feel are largely attributable to affirmative action.

In the area of employment, we find that between 1973 and 1979 there was an increase of close to 4 percent of Hispanics going into more professional, technical, and managerial types of jobs.

We find that there was a significant increase, also, between this time period of Hispanic women going into more professional types of jobs.

The bottom line, as is commonly referred to now, from our perspective, is that while Hispanics still remain in many low-paying jobs disproportionately, they did advance in their standing in the labor market relative to the improvement made by all workers in the country.

In the area of education, we find that between 1970 and 1978 there was an increase of better than 2 percent in the number of Hispanics in undergraduate programs. We find that there was an increase of 1 percent in those Hispanics and graduates in first professional schools.

We do find that there is a significant—at least from our perspective—and good progress being made. Certainly it does fall short of many of our expectations.

We contend in our written testimony that the reason why the progress has not been as great as we would like is because of a lack of leadership. The leadership primarily comes from the people who control the powers of opening up more opportunities.

In the area of education, we find that in the United States there are, I believe, four Hispanics who are presidents of universities. There are 16 Hispanics who are presidents of 2-year colleges. Of all the faculty in the country, 1.4 are Hispanic. Of tenured faculty in the country, 1.1 percent are Hispanic.

These are the people who are the role models. These are the people who control the programs and the spirit of actual compliance on a voluntary basis or as a result of OFCCP coverage and affirmative action concepts in general.

These are the people who control how well the progress is going to be made.

We find that progress cannot be made very effectively because Hispanics are not in those positions to control the opportunities.

A case in point: In the State of California, 17 percent of the work force are Hispanics. I think it is even above the population of Hispanics in the State of California. Why? Because the major Government entity in the State of California, which is the Department of Health and Welfare, is run by a Hispanic.

There is a very strong commitment from the Governor of California and from this Hispanic (Secretary Mario Obledo) to open up the opportunities to Hispanics.

In those cases, we do not find the Secretary of the Agency of Health and Welfare in the State of California coming before you to complain about the burdensome requirements of OFCCP or just affirmative action in general.

What we do find is that because of the voluntary compliance based on a strong commitment, they have in fact fulfilled the spirit of the law in most cases.

We do not find these types of people coming before you. We do not see examples of success presenting their views and constructive criticism. We do find however, individuals and representatives of the private sector who do have problems.

We agree, to a certain extent, with the problems that have been presented today—not only orally but also in the written testimony.

We would caution people to remember that prior to any kind of OFCCP program, there was not very much hiring of minorities taking place.

Sure Boeing can say that in 1967 it had a good record, and we laud Boeing for doing that. Perhaps in Boeing's situation, there are exceptional circumstances and perhaps more attention should be focused on the problems they have with OFCCP.

What we are trying to say simply is that there are many exceptions to the rules, and there are many things that should be changed in this program.

I think the thing that primarily concerns us is the fact that we are making a case it appears and we are developing a record in this committee for virtually dismantling OFCCP as we know it.

I think the thing that concerns us are the comments being made by the private sector—and the representative from the chamber of commerce indicated that, and the other witnesses have also supported that—that they would like to see abolishment of OFCCP.

Perhaps from their perspective that is necessary.

We would seriously doubt, and not in a critical way, and we would challenge some of those companies that one members of the chamber of commerce on whether they in fact would voluntarily comply with the spirit and intent of affirmative actions.

What we would very much like to see is a relaxing of the adversarial nature of OFCCP. We would very much like to see if in fact there is some kind of a phasein program where perhaps those employers who do not have a record of discrimination perhaps could be approached in a voluntary manner first.

Then after a period of time, if progress is not made accordingly, there should be a much stronger enforcement being applied.

We would also say that for those companies that have voluntarily complied and have done a very good job we would be interested in seeing some kind of quality control—not a 3- or 5-year exemption—but some kind of a periodic examination.

We would like to see that relaxation of the burdensome reporting systems that probably do not do much because, obviously, much of the reporting as stated today has not helped OFCCP keep figures on whether the hiring of minorities has actually taken place.

We are here to say basically that we do recognize and we do support the efforts to try and improve the system, but we are concerned with the direction and the comments that are being made that almost lead us to believe that if we do not have OFCCP, we are going to be better off.

We do not subscribe to that contention; we do not believe it. We do believe that certain changes can be made in OFCCP to improve the manner in which it enforces the law and maintain the same intensity and commitment of hiring minorities.

One last point, and we would underscore this point.

We are not going to give you the typical line that most people would expect out of civil rights groups that we want more enforcement and so forth.

I think that is a fairly well-given point.

The concern we have is that we want to criticize this mechanism for hiring minorities. However, the problem really lies on the lack of commitment that we find—even in the Government itself. The one entity that supposedly should set the example is perhaps the worst abuser, at least in the area of Hispanics.

The abuse does not come because of failure of a system to work. It comes because of a breakdown in the commitment—the fact that there is very little commitment on the part of those in power to make the change to actually subscribe to the change and to actually bring in the change.

That is the major problem, and I think it is very difficult to legislate that.

Doing away with OFCCP is certainly not going to remedy anything but makes matters worse. Voluntary compliance solely is certainly not going to get that kind of commitment.

Thank you very much.

Senator WILLIAMS. Thank you.

[The prepared statement of Mr. Torres and questions and responses follow:]

League of
United Latin
American Citizens

Office of National President
TONY BONILLA

TESTIMONY

BEFORE

U.S. SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

REGARDING:

AFFIRMATIVE ACTION

PRESENTED BY

ARNOLDO S. TORRES
NATIONAL EXECUTIVE DIRECTOR
LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC)

P. O. DRAWER 5427 2590 MORGAN AVENUE CORPUS CHRISTI, TEXAS 78405 512/882-8284
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GOOD MORNING MR. CHAIRMAN, MEMBERS OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES. MY NAME IS ARNOLDO S. TORRES, I AM THE NATIONAL EXECUTIVE DIRECTOR OF THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), THIS COUNTRY'S OLDEST AND LARGEST HISPANIC ORGANIZATION WITH OVER 100,000 MEMBERS ORGANIZED IN 44 STATES. WE VERY MUCH APPRECIATE THE OPPORTUNITY TO COME BEFORE YOU TODAY AND PRESENT OUR PERSPECTIVES ON THE CONCEPT OF AFFIRMATIVE ACTION. THESE TWO WORDS HAVE OVER RECENT PAST YEARS CREATED A GREAT DEAL OF CONTROVERSY, OFTEN TIMES AS A RESULT OF MISUNDERSTANDINGS AND IGNORANCE OF THE LAW.

AFFIRMATIVE ACTION AND EQUAL EMPLOYMENT OPPORTUNITY PROGRAMS HAVE BEEN THE SUBJECT OF SIGNIFICANT CRITICISM AND THE TARGET OF DRASTIC PROPOSALS THAT WOULD SERIOUSLY CURTAIL THE EFFECTIVENESS OF THESE PROGRAMS. THE MAJORITY OF THE CRITICISMS CENTER AROUND ARGUMENTS THAT COMPLIANCE WITH AA REGULATIONS IS EXCESSIVELY BURDENSOME AND EXPENSIVE FOR BOTH PRIVATE INDUSTRY AND THE REGULATORY AGENCY, AND THAT THE EXTREME COSTS OF SUCH COMPLIANCE OUTWEIGH THE BENEFITS OF EXISTING PROGRAMS. OTHER CRITICS CONTEND THAT AA CONSTITUTES REVERSE DISCRIMINATION AND AS SUCH ARE BOTH ILLEGAL AND UNCONSTITUTIONAL AND THE SOURCE OF INCREASED RACIAL TENSION AND DEVISIVENESS IN THIS COUNTRY. WHILE IMPROVEMENTS CAN

PERHAPS BE MADE TO IMPROVE THE OVERALL EFFECTIVENESS OF THE PROGRAMS, A NUMBER OF THE PROPOSALS SUGGESTED WOULD SERVE ONLY TO RENDER THE PROGRAM LARGELY INEFFECTIVE IN CURBING PAST DISCRIMINATORY HIRING PRACTICES.

IN AN ERA OF FISCAL RESTRAINT, CERTAINLY UNNECESSARY PAPERWORK AND EXCESSIVELY DETAILED COMPLIANCE REPORTS SHOULD BE CURTAILED WHEN FEASIBLE, WHERE THE ELIMINATED REGULATIONS DO NOT HAVE ANY SUBSTANTIAL EFFECTS ON THE EFFECTIVENESS OF THESE PROGRAMS. CERTAIN PROPOSALS MADE THIS SUMMER, HOWEVER, WOULD GO BEYOND THE ELIMINATION OF UNNECESSARY PAPERWORK TO EXCUSING THOUSANDS OF EMPLOYERS FROM THE GUIDELINES AND RESPONSIBILITIES OF AFFIRMATIVE ACTION. ONE CASE IN POINT IS THAT OF THE OFCCP'S PROPOSED RULE REGARDING AFFIRMATIVE ACTION REQUIREMENTS FOR GOVERNMENT CONTRACTOORS. THESE PROPOSALS, WHICH INCLUDE THE CONSIDERATION OF ELIMINATION OF BACK PAY AS A REMEDY; THE REQUIREMENT THAT ALLEGED DISCRIMINATION BE INDENTIFIED WHEN A THIRD PERSON LODGES A DISCRIMINATORY COMPLAINT; RAISING THE THRESHOLD; AND INSTITUTING A PRINCIPLE OF CONSOLIDATION WHILE ELIMINATING A PRINCIPLE OF AGGREGATION OF CONTRACTS ARE ONLY A FEW EXAMPLES OF CHANGES THAT WOULD IN EFFECT SEVERELY WEAKEN STRONG FEDERAL CONTRACT COMPLIANCE ENFORCEMENT. IT WILL SIGNAL THE END OF CONCERN BY THE MAJORITY OF FEDERAL CONTRACTORS ABOUT ENFORCEMENT OF THEIR EEO AND AFFIRMATIVE ACTION OBLIGATIONS. AND, IN ADDITION, IT WOULD CONSTITUTE THE ILLEGAL USE OF PUBLIC FUNDS AS SUBSIDIZING FIRMES ENGAGING IN EMPLOYMENT DISCRIMINATION.

SOME CRITICS MANINTAIN THAT THE MOST EFFECTIVE MEANS OF GUARDING AGAINST DISCRIMINATION IS TO ABOLISH ANY REFERENCE TO RACE, SEX OR COLOR IN THE HIRING PROCESSES. AFFIRMATIVE ACTION

PROGRAMS ARE OF COURSE ANATHEMA TO THIS HYPOTHESIS, BUT WE FEEL THAT GOALS AND TIMETABLES ARE THE ONLY EFFECTIVE WAYS TO INCREASE MINORITY REPRESENTATION IN THE WORK FORCE. WITHOUT NUMBERS, MEASURES, GUIDELINES, OR STANDARDS WHICH NECESSARILY ENTAIL A MINIMAL LEVEL OF REPORTING AND EVALUATING QUANTITIES OF PAPERWORK, PLAINTIFFS OR EMPLOYERS WILL USE SOPHISTICATED, COVERT DISCRIMINATORY PRACTICES TO DISPORVE MOTIVE OR INTENT OF DISCRIMINATION. AND ANY RETREAT FROM STATISTICAL MEASURES TOWARDS OTHER MEASURES OF COMPLIANCE, WHILE RETREATING FROM AN AVOWED POLICY TO ACTIVELY FIGHT DISCRIMINATION IN HIRING PRACTICES, DO NOT REALLY EVEN HELP MUCH TO ELIMINATE THE COMPLIANCE BURDEN FOR PRIVATE INDUSTRY OR THE AGENCY.

OUR CONCERN IS THAT MINORITIES IN GENERAL, AND HISPANICS IN PARTICULAR, NOT BE SUBJECT TO THE KIND OF BLATANT AND UNEXCUSABLE DISCRIMINATION IN HIRING THAT HAS CONFRONTED THEM IN THE PAST, AND STILL EXISTS, ALTHOUGH TO A LESSER EXTENT, TODAY. THE SUPREME COURT, ACKNOWLEDGING THE EXISTENCE OF SUCH DISCRIMINATION, DEEMED PERMISSIBLE THESE RACIAL AND ETHNIC NUMERICAL MEASURES AS A REMEDY TO REVERSE THE CONTINUING EFFECTS OF PAST DISCRIMINATION. IF THAT DISCRIMINATION WERE NOT STILL CONTINUING, IF THERE TRULY EXISTED IN NAME AND IN FORM EQUAL OPPORTUNITY FOR ALL AMERICANS, THEN THE PROGRAM WOULD NO LONGER BE NECESSARY. EQUAL OPPORTUNITY IN EMPLOYMENT HOWEVER DOES NOT EXIST. IN MARCH OF 1979, THE UNEMPLOYMENT RATE WAS 6.1% OVERALL WHILE FOR HISPANICS THAT FIGURE WAS 8.7%. AMONG HISPANIC YOUTH, THAT FIGURE ROSE TO 17.2% WHILE THE COMPARABLE FIGURE FOR WHITE YOUTHS WAS ONLY 12.5%. IN

1978 THE MEDIAN EARNINGS OF ALL NON-HISPANIC MALES AND FEMALES STOOD AT $12,300 AND $5,300.00, RESPECTIVELY. FOR HISPANIC MALES AND FEMALES, HOWEVER, THOSE FIGURES WERE MERELY $8,900 AND $4,700. IF EMPLOYMENT DECISIONS WERE TRULY BASED SOLELY ON MERIT, AND RACE CONSIDERATIONS WERE NONEXISTENT, THEN SUCH WIDE DISPARITIES SIMPLY WOULD NOT EXIST.

AFFIRMATIVE ACTION PROGRAMS COULD HELP TO ALLEVIATE SUCH INJUSTICE. HISPANIC REPRESENTATION IN THE FEDERAL GOVERNMENT WORKFORCE INCREASED FROM 2.8% IN 1970 TO 3.7% IN 1979 IN RESPONSE TO PROGRAMS OF THE EEO AND THE CIVIL RIGHTS ACT. STATE GOVERNMENTS ALSO IMPROVED THEIR HIRING PRACTICES SLIGHTLY, ONE EXAMPLE BEING THE STATE OF CALIFORNIA WHERE HISPANIC CIVIL SERVANTS INCREASED IN THEIR TOTAL PERCENTAGE OF THE WORK FORCE FROM 5.2% TO 9.1%. HOWEVER, THE HISPANIC PERCENTAGE OF THE WORK FORCE OF THE STATE OF CALIFORNIA IS CONSIDERABLY HIGHER AT 17%. THIS IS PRIMARILY DUE TO THE COMMITMENT OF THE GOVERNOR OF CALIFORNIA AND THE SECRETARY OF HEALTH AND WELFARE OF THE STATE (LARGEST STATE EMPLOYING AGENCY) TO HIRE HISPANICS BY CONDUCTING MAJOR OUTREACH AND RECRUITMENT EFFORTS. THIS IS A VERY IMPORTANT FACTOR FOR SUCCESS WHICH WILL BE DISCUSSED LATER IN THIS TESTIMONY.

CERTAIN PRIVATE INDUSTRIES ALSO DEMONSTRATE ADMIRABLE RECORDS ON INCREASED HIRING OF HISPANICS AND PROMOTIONS OF THEM TO PREVIOUSLY CLOSED FIELDS, AS A DIRECT RESULT OF REQUIRED COMPLIANCE WITH AA REGULATIONS AND DISCLOSURE OF SUCH COMPLIANCE.

Employment Statistics compiled by the U.S. Department of Labor indicate that 35.6% of Hispanic men were more likely to be employed in the professional and technical, managerial, and craft and kindred worker occupations in 1979 as opposed to 32.4% in 1973. Hispanic women gained also, in the clerical, professional and technical, and managerial and administrative occupations in the same time frame. So that although Hispanics remain too heavily concentrated in low paying and low skilled occupations, Hispanics did advance their standing in the labor market relative to the improvement made by all workers.

In the field of education, where Hispanics can take an important first step towards more open access to employment opportunities, important gains have indeed been made. A Stanford University Institute for Research on Educational Finance and Governance Report compiled by Dr. Michael Olivas of LULAC indicates that Hispanic enrollment in institutions of higher education has increased between 1970 and 1979. The following table documents this advancement.

Table 3.09.–Hispanics as a percent of all full-time students in institutions of higher education, by level of study: Fall 1970–1978

Fall of year	Undergraduate[1]		Graduate and first-professional[1]	
	Number	Percent of all students	Number	Percent of all students
1970[2]	98,453	2.1	5,680	1.2
1972[2]	131,084	2.4	8,661	1.5
1974	157,572	2.8	9,016	1.5
1976	191,065	3.3	12,149	2.0
1978	196,451	3.5	13,170	2.2

[1] Does not include institutions of higher education in Puerto Rico and outlying territories, or U.S. service schools.

[2] "Spanish-surname-American" was the ethnicity designation on the form in these years. Also graduate and first-professional students were combined.

SOURCE: U.S. Department of Health, Education, and Welfare, Office for Civil Rights, *Racial and Ethnic Enrollment Data from Institutions of Higher Education*, for 1970 data: *Fall 1972;* for 1972 data: *Fall 1976;* and for 1974 through 1978 data: *Fall 1978.*

TABLE 5: Percent Distribution of Employed Persons of Hispanic Origin, by Occupation and Sex, 1979 Annual Averages

Origin and Sex	Total Employed		White Collar				Blue Collar					
	Number (thousands)	Percent	Professional and Technical	Managers and Administrators	Sales	Clerical	Craft and Kindred	Operatives, except Transport	Transport Equipment Operatives	Nonfarm Labor	Service	Farm
Total 16 years and older	96,945	100.0	15.5	10.8	[illegible]	18.2	13.3	11.3	3.2	4.8	13.2	2.8
Total Hispanic	4,606	100.0	7.6	6.0	3.9	15.1	13.9	21.5	4.0	7.8	16.3	3.8
Mexican	2,864	100.0	5.6	5.2	3.1	13.9	14.9	21.9	4.4	9.4	16.1	5.5
Puerto Rican	481	100.0	9.8	4.8	3.5	16.9	9.6	23.9	4.2	5.4	19.1	0.6
Cuban	361	100.0	12.2	8.6	6.4	16.5	13.0	22.4	3.9	5.0	11.4	0.6
Men 16 years and over	56,499	100.0	15.1	14.0	6.0	6.1	21.5	11.6	5.9	7.3	8.3	3.9
Total Hispanic	2,849	100.0	7.2	7.4	3.2	5.8	21.9	19.2	6.3	11.9	13.0	5.0
Mexican	1,842	100.0	5.3	6.4	2.2	4.8	21.7	20.1	6.6	13.7	12.2	7.1
Puerto Rican	298	100.0	7.7	5.4	3.4	9.1	14.1	23.8	6.7	8.7	20.5	0.7
Cuban	208	100.0	13.0	12.5	5.8	8.7	19.7	15.9	6.7	7.3	9.6	1.0
Women 16 years and over	40,446	100.0	16.1	6.4	6.9	35.0	1.8	10.8	0.7	1.3	19.8	1.2
Total Hispanic	1,757	100.0	8.4	3.9	5.2	30.2	2.4	25.2	0.3	1.3	21.7	1.7
Mexican	1,022	100.0	6.2	3.2	4.7	30.3	2.5	25.1	0.4	1.6	23.4	2.6
Puerto Rican	183	100.0	13.1	3.8	4.4	35.0	2.2	24.0	--	0.5	16.9	0.5
Cuban	152	100.0	11.2	3.3	7.2	28.3	3.3	31.6	0.7	1.3	13.8	--

* Source: Bureau of Labor Statistics, U.S. Department of Labor, unpublished data.

1/ Numbers may not add up to 100 due to rounding.

WHILE THESE NUMBERS SHOW THE PENETRATION OF HISPANICS INTO POSTSECONDARY INSTITUTIONS AND THE LABOR MARKET, IT HAS NOT BEEN AS DEEP AS WE WOULD LIKE TO SEE. WE CONTEND THAT THIS PROGRESS HAS NOT ADVANCED AT A MORE RAPID PACE DUE TO THE LACK OF LEADERSHIP IN EDUCATIONAL INSTITUTIONS AND IN THE PRIVATE AND PUBLIC SECTOR IN GENERAL. CASE IN POINT IN THE AREA OF EDUCATION IS THE FACT THAT THERE ARE 5 HISPANIC FOUR-YEAR UNIVERSITY PRESIDENTS, AND 16 HISPANIC TWO-YEAR PRESIDENTS ON THE MAINLAND. IN THE AREA OF FACULTY, HISPANICS COMPRISE ONLY 1.4% OF ALL UNIVERSITY INSTITUTIONS AND ONLY 1.1% OF ALL TENURED PROFESSORS. WHILE WE DO NOT HAVE FIGURES FOR MEMBERS OF THE BOARD OF DIRECTORS OF THE MAJOR INDUSTRIES OF THIS COUNTRY WE WOULD VENTURE TO SAY QUITE SAFELY THAT WE ARE SORELY REPRESENTED. THEREFORE, IF THE LEADERSHIP FOR ESTABLISHING THE TONE AND SPIRIT OF AFFIRMATIVE ACTION IS NON-EXISTENT, THE RESULTS WILL OBVIOUSLY NOT BE AS SIGNIFICANT AS WE WOULD LIKE TO SEE.

DESPITE OUR FIRM CONVICTION OF SUPPORT FOR AFFIRMATIVE ACTION WE DO RECOGNIZE ASPECTS OF THIS PROCESS WHICH MUST AND SHOULD BE ALTERED. WE ARE AWARE OF THE OVER-REGULATION WHICH EMPLOYERS ARE CONFRONTED WITH ON A DAILY BASIS. WE ARE BOTHERED THAT THIS SOMETIMES BURDENSOME PROCESS HAS AT TIMES PRESENTED MORE OF A DISINCENTIVE FOR PARTICIPATION AND/OR COMPLIANCE WITH AFFIRMATIVE ACTION. WE SERIOUSLY SUPPORT EFFORTS TO HAVE VOLUNTARY COMPLIANCE BUT ARE VERY DISTRESSED TO HEAR THAT THIS SHOULD BE THE PRIMARY APPROACH. WE WOULD RATHER SEE A LESSENING OF THE ADVERSARIAL

NATURE OF THE ENFORCEMENT AGENCIES, HOWEVER WE WOULD CAUTION ALL TO RECOGNIZE THAT THIS POSTURE IS NOT BROUGHT ABOUT BY CHOICE BUT OFTEN TIMES BY CIRCUMSTANCES. WE ARE EXTREMELY INTERESTED IN WORKING WITH THIS COMMITTEE AND ITS LEADERSHIP TO IMPROVE THE HIRING AND INCLUSION OF MINORITIES AND WOMEN IN THIS COUNTRY'S LABOR MARKET AND MAINSTREAM INSTITUTIONS HOWEVER LULAC IS STRONGLY COMMITTED TO INSURING THAT THE WHATEVER PROPOSED CHANGES DO NOT DEVIATE FROM THIS OBJECTIVE. WE ARE CONCERNED WITH WHAT THE BOTTOM-LINE IS, WHETHER HISPANICS ARE ACTUALLY GIVEN OPPORTUNITIES HOWEVER THE PROCESS AND APPROACH WHICH IS UTILIZED IS EXTREMELY IMPORTANT FOR IT WILL BE THE VEHICLE TO IMPROVING THE STATUS OF MANY DIS-ENFRANCHISED PEOPLE.

THANK-YOU.

ORRIN G. HATCH, UTAH, CHAIRMAN

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United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, D.C. 20510

October 26, 1981

Mr. Arnold Torres
League of United Latin American Citizens
400 First Street, N.W.
Suite 716
Washington, D.C. 20001

Dear Mr. Torres:

Enclosed please find a copy of the questions submitted for your response during the October 22, 1981, OFCCP oversight hearing.

Please return the written responses within one week to my Committee office.

Thank you for your participation and timely comments given during these oversight hearings.

Sincerely yours,

Orrin G. Hatch

Orrin G. Hatch
Chairman

OGH:na

Enclosure

QUESTIONS FOR LULAC - ARNOLD TORRES

1. I AM PLEASED TO SEE YOUR ORGANIZATION IS SENSITIVE TO THE NEED TO ELIMINATE REGULATIONS WHICH DO NOT HAVE ANY SUBSTANTIAL EFFECTS ON THE PROGRAM. THIS COMMITTEE HAS HEARD, AND OUR PILOT SURVEY REINFORCES THIS, THAT OFCCP STAFF HAVE BEEN MORE CONCERNED WITH PROCESS THAN SUBSTANCE. TESTIMONIES OF THE TWO PREVIOUS WITNESSES INDICATE THAT AT NO TIME DID OFCCP RECOGNIZE THEIR GOOD FAITH EFFORTS IN REACHING OUT TO WOMEN AND MINORITIES; YET AN INORDINATE AMOUNT OF OUR VALUABLE FEDERAL AND PRIVATE SECTOR RESOURCES WERE WASTED ON THE FORMAT OF GOALS AND TIMETABLES YOU SUPPORT. HOW DOES THAT EXERCISE INCREASE THE NUMBER OF MINORITIES IN THE WORKFORCE?

2. MR. TORRES, YOU QUOTE STATISTICS OF UNEMPLOYMENT OF HISPANIC ADULTS AND YOUTH, THEN YOU STATE THAT "IF EMPLOYMENT DECISIONS WERE TRULY BASED SOLELY ON MERIT AND RACE CONSIDERATIONS WERE ~~MORE~~ NON EXISTENT, THEN SUCH WIDE DISPARITIES SIMPLY WOULD NOT EXIST. AREN'T YOU BEING TOO SIMPLISTIC YOURSELF IN STATING THAT THE ONLY REASON FOR HISPANIC UNEMPLOYMENT IS DUE TO DISCRIMINATION? YOUR ORGANIZATION, AS A MATTER OF FACT, IS EXTENSIVELY INVOLVED IN EDUCATION AND TRAINING PROGRAMS TO HELP HISPANICS. DON'T YOU THINK THOSE EFFORTS ARE IMPORTANT IN REDUCING UNEMPLOYMENT ALSO?

3. IF YOU HAD YOUR CHOICE, WOULD YOU RATHER SEE OFCCP CONTINUE TO CONCENTRATE ITS REVIEWING THE GOALS AND TIMETABLES BY JOB GROUPS OF A CONTRACTOR'S WORKFORCE, OR WOULD YOU RATHER HAVE THEM CONCENTRATE RESOURCES TO SEE WHAT GOOD FAITH EFFORTS CONTRACTORS MADE TO BRING MINORITIES INTO THE WORKFORCE? THIS COULD INCLUDE EFFORTS SUCH AS

PROVIDING SCHOLARSHIPS, SUPPORTING TRAINING PROGRAMS, AND/OR SUPPORTING COMMUNITY BASED EFFORTS SUCH AS YOUR SER PROGRAM?

4. YOU INDICATE SOME STATE GOVERNMENTS HAVE MADE PROGESS TO HIRE HISPANICS THROUGH MAJOR OUTREACH AND RECRUITMENT EFFORTS, YET OFCCP HAS NOT GIVEN CONTRACTORS CREDIT FOR THAT. THEY ARE MORE PREOCCUPIED WITH NUMBERS AND FINDING AFFECTED CLASSES. HOW WOULD YOU SEE OFCCP STIMULATING MORE RECRUITMENT AND OUTREACH EFFORTS, WHICH AS YOU KNOW, IS THE ONLY AFFIRMATIVE ACTION REQUIREMENT TO BE FOUND IN THE EXECUTIVE ORDER.

5. WHILE I CAN APPRECIATE YOUR BELIEF THAT HAD IT NOT BEEN FOR EXECUTIVE ORDER 11246 -- AFFIRMATIVE ACTION, INCREASE OF MINORITY HIRING WOULD NOT HAVE GROWN, DON'T YOU THINK THERE WERE OTHER FACTORS AT WORK SUCH AS AN ENLIGHTENED AMERICAN PUBLIC, TITLE VII ENFORCEMENT BY EEOC, AND PERHAPS MOST SIGNIFICANT, PRIVATE LAW SUITS?

(SUGGESTED COMMENT)

I AM AWARE OF LULAC'S VIGOROUS AND LONG EFFORTS TO IMPROVE OPPORTUNITIES FOR HISPANICS AND TO PROTECT CIVIL RIGHTS IN THIS COUNTRY. THIS COMMITTEE WOULD APPRECIATE YOUR FUTURE SUPPORT AND SUGGESTION AS WE MOVE FOREWARD IN POOLING OUR BEST IDEAS WHICH WILL HELP US REACH OUR GOAL.

Responses to written questions regarding October 22, 1981 hearings on Affirmative Action. (Submitted by Committee)

QUESTION #1: I am pleased to see your organization is sensitive to the need to eliminate regulations which do not have any substantial effects on the program. This Committee has heard, and our pilot survey reinforces this, that OFCCP staff have been more concerned with process than substance. Testimonies of the two previous witnesses indicate that at no time did OFCCP recognize their good faith efforts in reaching out to women and minorities; yet an inordinate amount of our valuable Federal and private sector resources were wasted on the format of goals and timetables you support. How does that excercise increase the number of minorities in the workforce?

RESPONSE

We are sensitive to the concerns of those who would seek to devise a more streamlined and efficient system for regulating and enforcing this program. We would however disagree with your statement that the Office of Federal Contract Compliance has been more concerned with process than substance. It is difficult to draw that general conclusion from witnesses that primarily represent one facet of the issue. Perhaps if a research design was developed to assess objectively process , versus substance, we would be in a better position to reach some conclusions. Until then, such statements have a tendency to confuse the situation.

In addition, we do not agree that inordinate amounts of our valuable Federal and private-sector resources were wasted on goals and timetables. We also regret the unfortunate occurence that no specific data is maintained to document actual increases in minority employment as a direct result of goals and timetables, but we certainly recognize and have experienced that with the advent of goals and timetables many Hispanics and other minorities have found employment, and specifically in occupations and positions previously denied.

Also, the statistics we cite in our written testimony with regards to progress made by Hispanics in specific labor occupations and in educational institutions cannot be attributed to the benevolence of employers. This progress has come from the utilization of goals and timetables as a measuring stick to gauge committment and effort to insuring that minorities and women have greater participation in the workforce. OFCCP has specifically carried out its mandate which has often times resulted in increased hiring of minorities and women.

QUESTION #2

Mr. Torres, you quote statistics of unemployment of Hispanic adults and youth, then state that "if employment decisions were truly based solely on merit, and race considerations were more existent, then such wide disparaties simply would not exist. Aren't you being too simplistic yourself in stating that the only reason for Hispanic unemployment is due to discrimination? Your organization. as a matter of fact, is extremely involved in education and training programs to help Hispanics. Don't you think those efforts are important in reducing unemployment also?

RESPONSE

First off, our quote read as follows, "If employment decisions were truly based solely on merit, and race considerations were non-existant then such wide disparaties simply would not exist." It is not our opinion now, nor has it ever been our opinion, that the only reasons for Hispanic unemployment is due to discrimination. We presented in our testimony figures depicting the differences in employment for Hispanics and other groups to point out just how wide the disparity between the rates for each group. We are aware that there are many factors behind this gap and we believe in the efficacy of training and education programs to assist in eradicating such disparities. However, such wide differences in employment rates cannot be totally attributable to lower skill levels and training of Hispanics especially when we examined and recognize the significant gaps in positions at the higher end of the professional level. We believe that another very key factor impeding equal opportunity in employment for Hispanics is racial discrimination. We continue to see many instances where qualified Hispanics are denied employment merely because of their race. In those cases unfortunately, training and education in an of themselves would not solve the problem. The Supreme Court has ruled appropriate goals and timetables as legitimate remedies to the ongoing effects of past discrimination. With goals and timetables employers find it more difficult to disguise discrimination in a variety of subtle and discreet ways.

In addition, while your point is well made concerning the need for employment training programs we must emphasize the realities of the Reagan Administration's objectives of reducing federal spending for such programs. In fact, we note that the Administration will reduce by fiscal year 1983 the total budgeted monies for these programs in FY'81 by approximately 65%. This would hardly leave us with much to work with in addressing the need to train the unskilled. It is imperative that we be aware of this situation for decisions must not be based on conceptual desires but rather on the realities confronting the situation. In other words, talk of giving increased importance to such training programs in lieu of affirmative action is somewhat naive and lacking the knowledge of what are some workable alternatives.

QUESTION #3: If you had your choice, would you rather see OFCCP continue to concentrate its reviewing the goals and timetables by job groups of a contractor's workforce, or would you rather have them concentrate resources to see what good faith efforts contractors made to bring minorities into the workforce? This could include efforts such as providing scholarships, supporting training programs, and/or supporting community based efforts such as your SER program?

RESPONSE

As stated before, while we do in principle support a system of OFCCP goals and timetables, we would also somehow like to encourage and recognize the good faith efforts of contractors to employ minorities. We do see several problems, however, with employing either measure exclusively. We have seen the complexities involved in a program of goals and timetables and fail to see how the OFCCP could even begin to insure compliance with Affirmative Action objectives by reviewing each contractor's variety of "good faith" measures to reach minorities. Attempts to do this would prove exceedingly more costly and complex than the present compliance system.

Hence, we fear that such a system could not be feasibly enforced and would threaten to break down into a program of voluntary compliance. We would strongly urge you to avoid such a hazardous situation at all costs. With an effective AA program, employers have devised and implemented strategies for the recruitment and employment of minorities that in many cases they would not otherwise have introduced. Such efforts have resulted in a substantial increase in the numbers of minorities employed. Measuring the intent and effectiveness of good faith efforts by looking at the final figures is imperfect, but a better more efficient method of measurement has not yet been presented. Those employers who have just recently implemented serious outreach programs, the beneficial effects of which have not yet been realized, should of course be given the opportunity to demonstrate the figures are not indicative of their good faith efforts. Slight variations in the present system can allow for that while insuring that the goals of the program are still carefully enforced.

QUESTION #4: You indicate some state governments have made progress to hire Hispanics through major outreach and recruitment efforts, yet OFCCP has not given contractors credit for that. They are more preoccupied with numbers and finding affected classes. How would you see OFCCP stimulating more recruitment and outreach efforts, which as you know, is the only Affirmative Action requirement to be found in the Executive Order?

RESPONSE

We would disagree with your contention that OFCCP is "more preoccupied with numbers and affected classes." While we do advocate changes in certain aspects of OFCCP procedures, we do not do so out of a concern for the allegation you have stated. As we have previously indicated, more emphasis must be given to improving recruitment and outreach efforts by private employers. This effort should not in any way detract from the importance of goals and timetables but should certainly serve as a major contributor to the hiring of minorities and women.

Frankly, it has been very disappointing to witness the types of recruitment and outreach which some employers conduct. In fact, we were extremely shocked to know that very little recruitment and outreach is conducted by many employers. This would appear to be very counter-productive but nonetheless accurate. Perhaps OFCCP and employers could conduct regional seminars on how to improve recruitment and outreach efforts and include minority and women's organizations in such sessions. The communications networks of these organizations are often times very elaborate and effective, and could be used by employers. We would, however, strongly emphasize again that this effort not serve to curtail or hinder the use of goals and timetables. After all, we all want minorities and women to increase their numbers in the workforce and not only concern ourselves with good intentions. (As someone once said--"the road to Hell is paved with good intentions.")

QUESTION #5: While I can appreciate your belief that had it not been for Executive Order 11246--Affirmative Action, increase of minority hiring would not have grown, don't you think there were other factors at work such as an enlightened American public, Title VII enforcement by EEOC, and perhaps most significant, private law suits?

RESPONSE

We would agree that other factors such as those you mention have contributed to the increase of minority hiring but such progress has not come a dependence on the benevolence of the American public. The progress achieved has come about primarily through enforcement of federal statutes. We have found these federal statutes and orders to be the primary impetus for employers to hire minorities and women. The monitoring and enforcement efforts have obviously served as a daily incentive to comply with these laws. It must be recognized that a great deal more work must be done in this area in view of the considerable employment discrimination complaints annually handled by the EEOC, as well as the number of private law suits filed.

The reason for our strong support of Executive Order 11246 lies in the fact that this is the only federal citing and mechanism which reflects a firm committment to actually having minorities and women employed. While we recognize your reservations and objections to this interpretation of the order, we would point to the historical development of this order and how the affected groups have come to consider it. All other federal statutes mandate that employers should not committ specific actions-discriminatory hiring practices, etc. However, the spirit of Executive Order 11246 emphasizes the need and responsibility to hire minorities and women. This is why this law receives such support by our community for it directs that specific actions be taken in dealing with previous and present discriminatory practices.

Senator **Williams**. Is that last point you made, and I could not be here for the earlier statements, has it been made by anybody else here?

Mr. **Torres**. I do not believe so.

Not wanting to irk any of the previous witnesses, I would think that perhaps they alluded to it and they probably think it but it has not been made.

Senator **Williams**. That is a comment that has been addressed to the Government in many other areas—putting heavy demands on others and not recognizing that the Government falls far short of what it expects.

Mr. **Torres**. The thing that concerns us in making that point is that we would not want people to misinterpret the intention or the underlying concerns that we have.

We are not saying that because Government has done a poor job it does not have the right to direct or to indicate the desired results in other areas. It means that perhaps Government should work a little harder.

Maybe it has less progress to make than the private sector has to make, but certainly we are not saying it is the pot calling the kettle black. We are talking about the fact that there is a dismal record in most cases across the board.

We do not find that the work of OFCCP has significantly impeded the progress. We do feel that it has impeded some progress to some extent but certainly not to the level that has been contended today.

In other words, if we take the logic of the argument that is being made by previous witn[illegible]ich calls for the repeal of the OFCCP, would there be voluntary compliance on their part? Would hiring of minorities and women be better or worse?

In the case of Boeing, they make the case that it would. We are not as familiar with the specifics of that case as we would like to be.

We wonder out loud and we would challenge the private sector which makes those contentions. Would they have complied with the spirit of the law? Would they have created an environment in which OFCCP did not even have to bother to come in? They could have seen that taking place on their own.

I cannot believe that OFCCP is such an effective enforcer that it is bothering every private company in the country. I do not think there is any arm of the Government, when it comes to enforcement of civil rights laws, that is that effective.

It has been involved with some of your big employers who have a great deal of access to complain about that process.

To some extent, that is very legitimate.

However, we are very concerned that there is a mood to totally abolish it. We do not feel that is the proper approach. We think the pendulum is then swinging too much the other way.

Senator WILLIAMS. That is a very persuasive statement that you made. It is a very strong and very helpful statement.

How long have you been with the organization, Mr. Torres?

Mr. TORRES. We have been here 2½ years. We have had an office here now for 2½ years.

If I could just indicate for the record, we are the country's oldest and largest Hispanic organization in 44 States with over 100,000 members.

Those 100,000 members are concerned. Many of them are employers, and many of them do not like to comply with these things, as the witness who will be coming up for minority contractors will testify to.

The statements that it has not worked are rhetorical and not well-based. There is nothing there that really substantiates that.

Senator WILLIAMS. You are going to submit additional material?

Mr. TORRES. Yes, sir.

Senator WILLIAMS. There are some questions that Senator Hatch prepared that we will submit for your response in writing.

Mr. TORRES. I would like to close by saying that we will prepare for this committee's December hearings, hopefully, testimony that will be allowed to be presented on exactly what we would like to see take place in changes in OFCCP which will hopefully address the concerns that the private employers have brought out today and at other hearings.

Senator WILLIAMS. We will look forward to that.

Mr. TORRES. Thank you.

Senator WILLIAMS. Our next witness is Susan Brophy, chair of the Women for Blue Collar Jobs.

You are under the banner of Women for Blue Collar Jobs?

Ms. BROPHY. Yes; I am.

Senator WILLIAMS. Are carpenters considered blue collar?

Ms. BROPHY. They certainly are.

Senator **WILLIAMS**. You are from Boston?

Ms. **BROPHY**. Yes.

Senator **WILLIAMS**. I have a daughter who is a carpenter apprentice in Boston. Is she qualified for this group? She should join your group.

Ms. **BROPHY**. She should. I am happy to hear that.

Senator **WILLIAMS**. Please proceed.

STATEMENT OF SUSAN BROPHY, CHAIR, WOMEN FOR BLUE COLLAR JOBS, BOSTON, MASS.

Ms. **BROPHY**. Mr. Chairman, my name is Susan Brophy. I am the current chair of Women for Blue Collar Jobs, a national organization established to address the systematic discrimination against women in employment and to secure equality of opportunity for women in nontraditional occupations.

Until last May, I was the director of the women in construction project in Massachusetts. It was a successful, union-sponsored statewide preapprenticeship training program which was defunded by the current administration.

In addressing this committee on the issue of affirmative action, I would like to draw on my latter experience to exemplify both the success and necessity of Government-imposed goals and timetables in the work force.

The women in construction project was established in March 1978 in direct response to the promulgation of the women in construction regulations—[41 CFR 60.4].

Prior to the promulgation of these regulations, there was one woman construction worker in the Commonwealth of Massachusetts. Three years later there were over 400 women in the construction work force.

What this figure does not show, however, is the struggle that went with virtually every placement. However, the bottom line was that the women were hired as apprentices because the law required it and the unions and contractors simply chose to comply with the law or were compelled to comply with the law.

It was my experience that these regulations were the single most significant factor in accessing the construction industry for women.

Senator, oftentimes when thinking or talking about affirmative action, we think about numbers—percentages and goals. Today I would like to talk about affirmative action from a perspective that is often ignored or overlooked. I would like to tell you the actual beneficiaries of these policies—the names and faces behind the numbers—3 of the 400 women construction workers I met in Massachusetts.

I would like to invite you up to Everett, Mass., to meet Joan. Only 28 years old, she is an ex-alcoholic, has three children, and is the sole wage earner in her family.

When I met her she had been on welfare for years but had a burning determination to get off the roles. Now she is a cement mason apprentice with local 534, making $6.28 an hour and she is proud to be off welfare.

I would also like others on this committee to meet Barbara. Believe me she would have a few things to say. She would talk about 2 years ago when she was on welfare with two kids and a sick mother to support. She would talk about how her ex-husband tried to have her declared an unfit mother because she wanted to be a construction worker. Then she would talk about $10.22 an hour she is now making as a laborer and about the improvements she has made in her home and family life now that she has a skill and a job.

Finally, I would like to bring Paula down to Washington to meet with some of my colleagues in the construction industry. She would tell the story of her previous drug habit and how her children were taken away by court order. She would then talk about the $6.20 an hour she is making as an electrical apprentice and how her children have been returned to her. In short, she would talk about her new life.

Senator, there are hundreds of Joans, Barbaras, and Paulas in Massachusetts and in this country thanks to a thoughtful program of affirmative action.

What these women give back to this country, both in terms of tax contributions and productivity, more than compensates for the cost of any affirmative action program.

Additionally, all the women who participated in the women in construction project were low income. Therefore, placing them in the work force means a substantial Federal savings per person in welfare food stamps and medicaid.

I think even the most critical supply-siders can see the benefits of this.

The women in construction regulations have had a profound impact on women nationwide. The enforcement of these regulations has allowed women to break out of the devastating cycle of dead-end jobs.

Blue collar jobs afford the average woman the opportunity to increase her income by 200 percent.

More importantly, the effect of these goals and timetables has been to begin the reversal of overt discrimination against women in the construction work force.

Mr. Chairman, our President has told us that our lives and livelihoods are overregulated. I am no expert on Government regulation, but I can assure you that the women in construction regulations have worked. They have had a measurable effect on women's career choices and employment options. They are also fair.

Until the promulgation of these regulations, women were systematically prevented from making a career in construction. Now they are not.

Women make up 50 percent of the brainpower and person power in the country, yet this is a resource that is tragically underutilized in the work force.

Affirmative action in the form of goals and timetables provides women access to occupations in industries from which they had been previously excluded.

Most women work out of economic need, yet earn only 59 cents for every dollar earned by men. Only with the continued intervention of a sympathetic Congress and executive branch will women achieve what they deserve and are eminently qualified for—true parity in the work force.

I speak to you on behalf of the women who are now working in construction as a result of the goals and timetables—women with a new-found sense of pride and dignity, women earning dollar for dollar what their male coworkers are earning, women who are now wage earners and taxpayers.

I also speak for the women who in the future might seek construction work as a career-women who we can collectively offer hope for future economic independence—women who want choices and alternatives.

On behalf of these women, I ask for your compassion and understanding and your positive consideration of affirmative action.

We rely on you, our elected representatives, to order this Government's priorities to protect and support us in the workplace. We need your foresight and leadership in assessing and evaluating the proper role of Government in effecting true equal opportunity.

Mr. Chairman, I would like to thank you for this opportunity to address this committee and would be glad to answer any questions you might have.

Senator QUAYLE [acting chairman]. Thank you very much.

I guess my first question would be this:

In your estimation, what were the major roadblocks of preventing women from entering the construction field which the regulations helped to remove?

Ms. BROPHY. It is my experience that women are still not welcome in the construction work force. It is an industry that very much favors the status quo.

Obviously, with the imposition of the Federal regulations, contractors and unions were intimidated into complying with them. That is an obligation to comply with the law.

Therefore, just the fact that they are on the books and were enforced, often sporadically, was important psychologically and actually.

Senator QUAYLE. What kind of intimidation are you referring to?

Ms. BROPHY. They are intimidated by the fact that it was a Federal law.

I did not see a lot of good faith in the construction industry on the part of either the unions or the contractors. The fact that laws were on the books requiring them to hire women and minorities intimidated them. They would often comply for that reason.

Senator QUAYLE. Do both management and unions work together, do you think, to see the lack of enforcement of these laws?

Ms. BROPHY. I am not sure it is that overt.

The idea that the unions and contractors are separate in this whole thing is just simply not true. I think that if the unions had to choose between the contractors and the women, they would choose the contractors. I think the contractors would do the same thing.

I do not think it is a plot.

Senator QUAYLE. What do we need to do? We have the laws on the books.

What is the solution?

Ms. BROPHY. We have to keep them there. We have to keep those regulations the way they are, and we have to see that they are enforced.

I do not think there is anybody who thinks that OFCCP should not help contractors or unions comply, and the regulations should make it easy for them to comply.

I think the bottom line on the whole thing is that we want the contractors and the unions to do what they are being told to do by the law, and it should be made easy for them. OFCCP should not be an adversary of the contractors.

Senator **Quayle**. You do not think there is any need to change legislation or statutes? You indicate it is just basically an enforcement problem.

Ms. **Brophy**. My experience is that it is enforcement.

The only discussion I have heard of any changes in the regulations is to ease the contractors by raising the threshold. Right now it requires that any contractor receiving in excess of $10,000 must comply with the regulations.

What I have heard is that people are considering raising the threshold to $1 million, which in the construction industry and for groups like mine would be devastating. The construction industry is not only just general contractors—you may have a $1 million or $2 million project—but it is made up of subcontractors who are doing the work.

It was my experience that a few subcontractors had million dollar contracts. Therefore, it would have a profound effect on the numbers of women going into the industry.

Senator **Quayle**. How would you suggest that we get better enforcement? Do you have any solutions?

We have now identified the problems, and there is basically no problem with the statute, but there is the continual problem on its application and enforcement.

Where do you suggest we go?

Ms. **Brophy**. I think that OFCCP has to take its responsibility very seriously. They have to target contractors who are not in compliance.

We all have our horror stories about OFCCP.

One of the things that I always push for is OFCCP to actually take referrals from women's groups and minority groups on who were the bad contractors.

As some of the earlier witnesses have said, OFCCP did not necessarily show—they would go after people who had hired six women—and there just did not seem to be a lot of sense to whom they targeted.

I think they should thoughtfully target different groups, understanding that they have limited resources and then go after those people and make them comply and set examples.

Senator **Quayle**. Senator Williams, do you have any questions?

Senator **Williams**. Yes.

I might be wrong but I got the impression that back in the beginning the unions had some reluctance to fully join the spirit of opening up opportunities in construction, particularly to women. I get the impression that has given way and there is an attitude of recognizing that they have a responsibility. They are under the Executive order are they not?

Ms. **Brophy**. Yes. They are under a separate regulation.

Senator **Williams**. They are covered.

Ms. **Brophy**. Yes.

Senator **Williams**. They are not cooperating.

Ms. **Brophy**. Yes.

I think it is certainly a myth in Massachusetts that the unions are the roadblock to bringing women into the construction industry.

Senator **Williams**. They are?

Ms. **Brophy**. The myth is that the unions are holding up the thing.

It just has not been the case in Massachusetts.

For one thing, the women in construction project was a subsidiary of the State building trades which people thought was unheard of.

My experience is that when you wanted to try to get a woman on the job, you would call the contractor. He would say: I would love to hire her, but the union is blocking it. You would call the business agent and he would say: The contractor simply does not want her on the job.

The actual regulations apply to the contractors.

My experience is that if the contractor picked up the phone and told the business agent that he wanted a woman on the job the next day, the business agent would do it.

Neither of them were doing it because they wanted a woman on the job.

If they felt compelled to do it and told the business agent——

If it were the operating engineers and the contractor said he wanted someone tomorrow morning who knows how to operate a backhoe, whether the business agent wanted to or not they would put that person on the job.

The same thing goes for the women. If they wanted to do it, they would do it.

In Massachusetts, the unions were by no means the critical stumbling block.

Senator **Williams**. How about in the first stage in the apprentice programs. Are they cooperating there, too?

Ms. **Brophy**. Absolutely. The women who went through our program went into apprenticeship programs.

As a matter of fact, even though the money that a woman would earn would be greater if she went right into a journeyman slot, we certainly go the apprenticeship route because what we have experienced is that if they took a woman in just as a journeyman she was often being set up to fail because she just did not have the skills and would be the first person laid off.

We strongly recommend that our women go the apprenticeship route because they are untrained and they should be in apprenticeship. They should learn the skills.

Senator **Williams**. Thank you very much.

Senator **Quayle**. Let me follow that up. I think that is a good line of questioning.

You said that if the contractor would call up the business agent of the union to hire more women, you think that would be done.

Ms. **Brophy**. The contractor has the hiring responsibility. The women are indentured to the union. He would not ever call and say: Hire more women. He would say: I want a woman on the

Meridian Hotel project tomorrow morning. It is very specific about where the woman is going. The unions simply must comply with it. They are not adversaries either of the business agent and the contractor. They have the means to comply with it, and they can and will if the contractor insists.

Senator QUAYLE. Who controls the work force—the contractor or the union?

Ms. BROPHY. The contractor actually controls the work force. The unions make referrals.

The people on the work force are indentured to the union.

Senator QUAYLE. The contractor goes out and hires these people.

Ms. BROPHY. No. The union is a referral place, and the contractor calls the union and says how many people he wants on the job and who he wants on the job and what kinds of skills they should have.

Often there are people who have worked for a contractor before who the contractor will request.

Senator QUAYLE. I was somewhat under the impression that the contractor would go through the union hall to get the additional workers and employees.

Ms. BROPHY. That is correct.

Senator QUAYLE. It is a referral.

Ms. BROPHY. Yes.

The contractor has the ability to hire or fire somebody, and the contractor is also paying the check.

Senator QUAYLE. If they are in the referral business, do they have a number of women on the waiting rolls and in the training programs?

Ms. BROPHY. Yes and no.

Senator QUAYLE. Sufficient in number?

Ms. BROPHY. Yes; they do. Just using the case of Massachusetts, a lot of times the unions would not take the women into the local until the call actually came through from the contractor. If the woman went into the local, she would be required to pay the dues. It is difficult for an unemployed person to be paying union dues.

They would have a list, but they were not people who were actually indentured to the union. Then when the contractor asked that somebody be on the job, they would refer to that list.

Senator QUAYLE. Basically, the bottom line so far as the roadblocks are concerned, is that you are saying the roadblock is with the contractor.

Ms. BROPHY. If you actually look at the regulation and you see that it applies to the contractor and the contractor has a responsibility——

Senator QUAYLE. We might as well assign responsibility and blame. Why not?

That is what we are here for—to find out where the problems are.

You are saying it is with the contractor?

Ms. BROPHY. The contractor has a responsibility under the law. Yes.

Senator QUAYLE. OK. That is all I wanted to know. Thank you very much.

Senator WILLIAMS. I have one more question, Mr. Chairman.

You have seen significant improvement over the last few years in the employment of women in blue collar jobs.

Ms. BROPHY. Yes; I have.

Senator WILLIAMS. There has been an emphasis here on union jobs.

Ms. BROPHY. Yes.

Senator WILLIAMS. Have you a comparison of opportunities for blue collar women in the nonunion areas of construction?

Ms. BROPHY. In Massachusetts, we work particularly with the unions because of the opportunities for women through an apprenticeship program. It is training; it is free; and it is education. When you finish an apprenticeship program, there are certain guarantees at the end of it.

We tended less to look at nonunion contractors, although some of our women did go to work in nonunion contracts, specifically because most did not have that apprenticeship program and that opportunity for education, and the money was better with the union contractors.

For a woman to have a union card and be able to work any place in the country is a very important thing.

We felt it was greater protection for the women workers. As some would say, it is greater protection for the men workers.

Senator WILLIAMS. And training.

Ms. BROPHY. Yes. Training was critical.

There are women, particularly in the South where there are more nonunion contractors, who are in the nonunion construction industry.

Senator WILLIAMS. Thank you.

Senator QUAYLE. Thank you.

Next we have a panel:

Roger Blunt, Richard M. Chastain, and John Bridge.

Will you all please come forward?

Mr. Blunt, would you like to go first?

STATEMENT OF ROGER R. BLUNT, PRESIDENT, TYROC CONSTRUCTION CORP., WASHINGTON, D.C.

Mr. BLUNT. Thank you, Mr. Chairman.

My name is Roger Blunt, and I am a general contractor specializing in asphalt paving and general contracting here in Washington.

I testify today in behalf of the minority business community represented by the National Association of Minority Contractors of Washington, D.C. This association was created in 1969 to serve blacks, women, Puerto Ricans, Mexican Americans, native Americans, and Asian Americans. Its membership includes over 1,500 member firms and in behalf of America's small businesses.

Who are the real job creator's in our Nation's economy—General Motors, Chrysler, IBM, multinational corporations?

Over the last decade, America's small businesses have created 98 percent of all new jobs. More importantly, small businesses show the greatest potential for solving unemployment problems in the future.

Recent studies show that small business, dollar for dollar, provide 24 times more innovation than big business or Government, which leads to the crux of the matter which we are addressing today.

In general, small businesses need a fair shake. You, the lawmakers, need to design and enact reforms which will boost, not hinder, small business' growth.

Specifically, the Government's affirmative action requirements for Federal contractors urgently need revision.

The OFCCP regulations which implement Executive Order No. 11246 have become a burdensome albatross, oftentimes circumventing the very purpose for which they initially were intended.

While OFCCP, Department of Labor, should set forth guidelines and requirements for the participation and utilization of minorities and women in the construction industry, currently its regulations for the main part are costly and process-oriented.

On the other hand, there has been little success in achieving desired results—that is, to bring more women and minorities into the work force.

My company, Tyroc Construction Corp., is a small 100 percent minority-owned firm employing approximately 150 people on a seasonal basis. It was founded in 1971 and recently was identified in the top 50 nationwide black-owned firms.

One of the major problems confronting our business is the excessive amount of paperwork required by EEO affirmative action regulations.

Our business began in 1971 with an economic development administration long-term loan. We used this to finance machinery and equipment and to establish an asphalt paving operation in the District of Columbia.

The objective of this economic development administration program is to create jobs in high unemployment areas. We have been successful in this regard.

Historically, the work force in this industry is predominantly black. It continues to be even to this day. Yet for the last 10 years, I have been burdened with the requirement to fill out elaborate forms stating objectives and goals for hiring minorities in this industry.

It is clear to me that a more rational objective for the Government might have been to develop a broader ethnic mix in the paving industry in Washington and somehow to encourage a broadening of the ethnic mix.

From years of experience, I would suggest that certain companies should be excluded from the scope of the EEOC order. Perhaps a threshold of 250 employees and contracts of a million dollars or more should be the trigger to require certain reports.

Additionally, there should be less stringent EEO requirements on small contractors.

Not only is the cost burden enormous but the requirements penalize small firms who cannot meet the appropriate goals as prescribed.

One possible solution might be that minority participation goals could be specified for the contractor's entire work force regardless of craft or trade and regardless of SMSA or economic area.

The National Association of Minority Contractors also suggests that periodic certification of compliance and a minimum of reporting requirements are in order. Small businesses now must comply with the same regulations that a much larger firm must comply with.

A small contractor commits a larger percentage of his resources to this task, because he does not have the management or overhead base from which to draw. This increases the overhead to the small contractor and makes him less competitive.

A better approach would be to make random spot checks for compliance with a provision for sanctions against the deficient contractor. These sanctions should be limited to debarment or loss of contract.

The existing backpay penalty in OFCCP regulations should be eliminated. There does not appear to be any authority for levying this remedy, either in the procurement statutes or in the order.

Many small contractors and minority firms are union firms, and so is mine. Therefore, OFCCP's goals must recognize the fact that organized labor controls the hiring hall.

Under collective bargaining agreements, management and labor agree that the union will provide skilled and unskilled labor for contractors, and that the contractor will depend on the union for his manpower resources.

The contractor has no choice over whom the hiring hall sends to fill job openings.

If organized labor does not provide the required minorities or women, the contractor should not be penalized in the procurement or award of Federal or federally funded work.

Organized labor should share an equal responsibility with management for the recruitment of minorities, particularly women, and the achievement of affirmative action goals.

Finally, OFCCP has created a climate in which small businesses and particularly minority contractors have been subjected to unreasonable affirmative action regulations and goals.

What useful purpose is served by requiring a 100 percent minority-owned and operated firm with a total work force which is 85 percent minority to generate minority utilization reports on a regular basis?

A single annual report to OFCCP should be sufficient.

The National Association of Minority Contractors supports the position that affirmative action programs should be transformed into a positive and less-burdensome effort so that the private sector will be genuinely supportive by taking on a leadership role.

Only then will more minorities and women be brought into the mainstream of the construction industry's work force.

Thank you.

[Responses to questions submitted to the National Association of Minority Contractors follow:]

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QUESTIONS AND ANSWERS
To The October 22, 1981 Senate OFCCP
Oversight Hearings

QUESTION

1. In your statement, you discuss the distinctions, a lack thereof, between goals and quotas. Is it possible for OFCCP to design a regulatory system in which goals are not simply a euphanism for quotas?

NAMC ANSWER

The NAMC holds that goals in lieu of quotas should continue to be prescribed. We believe that it is possible for OFCCP to design a regulatory system in which goals are not simply an euphemism for quotas. While it may be difficult to impose sanctions for failure to achieve goals, it certainly is possible to provide incentives to those firms who do achieve them. In our view this would be a positive approach and would encourage contractors in this area. Incentives of various types are possible ranging from negotiated procurements, to reduced retainage, to specific compensation for goal achievement.

QUESTION

2. There have been several individual construction companies who have testified before this Committee concerning the problems that they have endured because of OFCCP's poor administration of the order. How should the Committee view their testimony?

NAMC ANSWER

Although we do not have detailed supporting documentation in this area, NAMC generally is aware of a lack of uniformity and, in some instances, poor administration of the order by OFCCP. The testimony, therefore, of several individual construction companies concerning this problem should be viewed with sympathy; and, action should be taken to correct those specific difficulties.

QUESTION

3. You have heard testimony from the women for blue collar jobs which makes two points. First, without the Women in Construction Project, women would be effectively barred from construction employment. Secondly, construction hiring goals are a necessary tool to ensure that women move into the construction workplace. Would you care to comment on these points?

NAMC ANSWER

Without question the Women in Construction Project has been effective in highlighting the plight of women in the construction industry. We believe that construction hiring goals are a helpful tool in assuring that women move into the construction work place. On the other hand, these goals must be developed carefully to insure that they are realistic in terms of availability and in terms of interest on the part of women. As we mentioned before, goals exceeded through the affirmative action of contractors are far better than unrealistically high goals which lead to many of the difficulties cited in your hearings.

QUESTION

4. Are there particular practices resulting from collective bargaining agreements that your members have which prevent women from receiving more construction work?

NAMC ANSWER

No response.

QUESTION

5. You say organized labor controls the "hiring hall" and it should share the responsibility with management for recruitment of women and minorities. Do you have any suggestions as to what should organized labor's responsibility be? Should they, for example, be held responsible by OFCCP to specific requirements?

-3-

NAMC ANSWER

In stating that organized labor controls the hiring hall and that it should share responsibility with management for recruitment of women and minorities, we mean that organized labor should be held to the same standards of compliance with the principals of non-discrimination in employment as are now required under Executive Order 11246 by contractors and subcontractors. Further, it has been our recent understanding that Section 207 of that order provides for the Secretary of Labor's "best efforts" in getting the unions to cooperate in implementing the purpose of the order. While sanctions can be taken against contractors and subcontractors, the NAMC believes it specifically inequitable to charge union contractors with noncompliance in instances of failure to meet certain hiring goals, when in fact, through collective bargaining agreements those contractors are obligated to the unions and their hiring halls for their source of labor.

Senator WILLIAMS [acting chairman]. Thank you very much. Why don't we go through the panel before we get to our questions. Who will proceed next? We have no designated order here so, ladies and gentlemen, it is your pleasure.

STATEMENT OF RICHARD M. CHASTAIN, VICE PRESIDENT OF CIVIL AFFAIRS, MORRISON-KNUDSEN CO., BOISE, IDAHO, ACCOMPANIED BY DENNIS BRADSHAW AND MICHAEL KENNEDY, ASSOCIATED GENERAL CONTRACTORS OF AMERICA

Mr. CHASTAIN. Thank you, Senator. My name is Richard Chastian, and I am the previous chairman and a member of the Equal Opportunity Committee of the Associated General Contractors of America. We have submitted a detailed testimony and would like to summarize if we may, if they may both be included in the record.

Senator WILLIAMS. They will be.

Mr. CHASTAIN. I am appearing here today on behalf of the association. I am accompanied by Dennis Bradshaw and Michael Kennedy of the association's national staff.

AGC and its 113 chapters service over 30,000 construction firms, including 8,500 of the Nation's leading general contractors. Many of these construction firms hold Federal and federally assisted construction contracts, and therefore have the responsibility to carry out the affirmative action mandates of the Office of Federal Contract Compliance.

I regret to advise you that 15 years of efforts to satisfy the compliance agency have produced little meaningful affirmative action, primarily because the agency has not made such affirmative action a part of its construction industry program. The program does not equip women and minorities to compete in the labor market.

The compliance agency has required contractors to process and file reams of paper. At the same time, OFCCP has overlooked the intent of Executive Order No. 11246, and that is, to increase the participation of women and minorities in the construction trades.

The compliance agency's current construction program overlooks the real need of its intended beneficiaries. The program has taken the unskilled and placed them in competition with the industry's skilled, and has declared that this is affirmative action. The program has itself created a syndrome of inequality, to the mutual discontent of men and women, whites and minorities. All sides cry discrimination. The construction contractor finds itself caught between the Government demands for employment of the unskilled women and minorities and the owner demands for timely completion of the construction project.

Regrettably, what we have been arguing about over these past many years is a program that cannot succeed because it does not provide for the education and skills training of women and minorities. Without education and training, women and minorities cannot know equality in employment opportunity. The program has become a form of social welfare. Recipients have no particular future. They merely play an endless numbers game. Paper is the winner and affirmative action is a full file cabinet.

Affirmative action should involve the education and skills training of women and minorities who are genuinely interested in construction work. With education and training, such persons can compete as individuals on an equal footing with the incumbents.

If affirmative action had taken the form of accelerated, competency-based construction skills training in 1965 when President Johnson promulgated the Executive order, we would have had the task completed by now. Instead, we have an inflationary paper chase which obscures the real needs of women and minorities and frustrates an industry already suffering from a weak economy.

I cannot find fault with the Government's intent to open new doors for women and minorities, nor can I find fault with a construction contractor who is simply looking for the best available workers. The contractor has promised to complete a given project within a given time at a given cost. We find ourselves in a "catch-22" situation because all this time we had the wrong program to achieve the desired result.

People do not get and keep jobs because the Government demands a piece of paper or declares a percentage. People get and keep jobs because they are qualified to perform desired tasks. In the effort to preserve what we now call affirmative action, we have ignored that equality of employment opportunity comes through education and skills training.

The association has already submitted comments on the OFCCP's recent proposal for revision of its current regulations. If you carefully read the proposal, you will find that the OFCCP is still primarily interested in paper, not people; in percentages, not skills acquisition; and in punishment, not cooperation. The compliance agency is about to commit the same error that the Johnson administration first committed in 1965, and which has caused the waste of so much time. The OFCCP has yet to recognize that women and minorities need to become competitive individually in the Nation's largest industry, construction.

Once again, equal opportunity is the opportunity to compete with others on an equal footing for available employment. The key is skill and ability to perform the desired tasks. Why do we find it so difficult to recognize that current policies and practices cannot achieve that goal? I can derive little satisfaction from recent efforts to make merely cosmetic changes in a program that has failed for 15 years.

Construction contractors will hire qualified people regardless of their race or their sex. The women and minorities fortunate enough to have gained the needed skills are already part of the Nation's construction work force. The problem is that there are not enough qualified minorities and women.

The logical conclusion is that we need more education and skills training. Why has the Government not reached this conclusion? Even the present administration has yet to display a serious intent to encourage a program of offsite, accelerated skills acquisition. Such a program is essential to opportunity in the construction industry.

It is time to adopt a program that can create equal opportunity by encouraging individuals to acquire the skills which are in demand. Such a program will add to a badly needed productive resource. The industry will absorb women and minorities because they are skilled. OFCCP's current construction program simply magnifies sex and race differences.

There is plenty of training capability available in this country, and resources presently allocated to compliance by OFCCP could go a long way toward making training an affirmative action reality. Local, ongoing, offsite, competency-based skills training programs can be the answer to the Federal Government's desire to create equal opportunity in the construction industry. The Government achieves its goal; the industry gets qualified help; minorities and women have a specified path to follow; the paper conflict is over; production improves; and equal opportunity becomes a reality.

Senator, it is time to make a change.

Thank you.

Senator WILLIAMS. Thank you very much. Your statement opens up many lines of inquiry, including how adequately we are organized for vocational training in the areas that are so familiar to you. We dealt with that issue a little bit with the prior witness representing Women for Blue Collar Jobs. We will maybe get a little discussion later.

[The prepared statement of Mr. Chastain follows:]

TESTIMONY OF

RICHARD M. CHASTAIN

FOR

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

BEFORE

THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

OCTOBER 22, 1981

ON

THE OFFICE OF FEDERAL CONTRACTS COMPLIANCE PROGRAMS

ENFORCEMENT OF

EXECUTIVE ORDER 11246

AGC and its 113 chapters represent:

* 30,000 construction firms;
* 8,500 of the nation's leading general contractors;
* Employment for 3.5 million individuals;
* A $200 billion market;
* More than 80% of the nation's contract and construction of commercial buildings, highways and industrial and municipal utility facilities;
* Over 50% of the construction performed abroad by American firms.

The Associated General Contractors of America has represented the interests of the construction industry for over sixty years. AGC is today the recognized spokesman for the industry. AGC and its 113 chapters service over 30,000 construction firms, including 8,500 of the nation's leading general contractors. These construction firms are responsible for the employment of 3.5 million individuals, and account for 80 percent or about $200 billion worth of contract construction of commerical buildings, highways and industrial and municipal utility facilities.

The construction industry remains not only the largest but also the most competitive of the major industries. The construction industry has no "big three"; rather, it is comprised of hundreds of thousands of small businesses. As a result, construction contractors deeply and fully appreciate the meaning of equal opportunity. Without an equal opportunity to bid on available work, a construction contractor cannot survive. AGC deeply and fully supports equality of employment opportunity.

However, AGC opposes any program or policy which requires a contractor to hire and retain a prescribed number of female and minority workers. From AGC's perspective, the only meaningful affirmative action is that which equips women and minoritites fairly to compete in the labor market.

When these hearings opened, Senator Hatch suggested that the Office of Federal Contract Compliance Programs had lost sight of its original objective. AGC agrees.

AGC recently likened the creation of a truly integrated society to the construction of a modern building. Both processes have distinct phases. To their credit, OFCCP and others have cleared the site. The agency has helped level archaic attitudes. To its serious discredit, OFCCP has yet to recognize that now is the time to proceed to the next phase. Now is the time to pour the foundation for lasting equality of employment opportunity. Now is the time to educate and train. OFCCP's continuing efforts to coerce federal contractors into compliance with its bewildering maze of highly technical regulations only obscure the real need.

OFCCP's current construction program was poorly conceived. The program is still poorly managed. A number of the agency's current policies exceed the scope of the agency's authority. The agency's various offices are not well coordinated. The agency's enforcement efforts are both inconsistent and harsh. Relatively minor and purely technical deficiencies result in demands for conciliation agreements. Field personnel do not understand either the current construction program or the construction industry. The agency appears far more concerned with political expediency than with careful analysis.

Without the requisite authority, OFCCP has demanded back pay from construction and other federal contractors. OFCCP has similarly exceeded its authority be exercising jurisdiction over private construction projects, including private projects distant from any federal or federally assisted projects. Finally, and again without the requisite authority, the agency has declared specific numerical goals for the employment of women and minorities. As AGC fully explains in the attached September 14 letter to the Acting Director of OFCCP's Division of Program Policy, all three policies are both unlawful and otherwise ill-adivsed.

OFCCP's current back pay policy exceeds the scope of the relevant statute, and conflicts with the Supreme Court's interpretation of Title VII of the Civil Rights Act of 1964. The most commonly recognized basis for Executive Order 11246 is the Federal Property and Administrative Services Act of 1949, which authorizes the President only to promote economy and efficiency in federal procurement. OFCCP's back pay policy does not increase the supply of qualified construction labor, or otherwise promote economy and efficiency in federal procurement. In fact, the reverse is the case. In addition, the Executive Order itself makes no reference to back pay or any other form of individualized or retrospective relief. Fianlly, OFCCP's back pay calculations ignore the Supreme Court's declaration, under Title VII, that back pay shall go only to specific, indentifiable victims of proven discrimination.

OFCCP's back pay policy is unnecessary because Title VII already provides a basis for victims of unlawful discrimination to recover any lost wages or other lost income.

OFCCP's exercise of jurisdiction over all private construction projects is unlawful for several of the same reasons. The agency's exercise of jurisdiction over private projects does not increase the supply of qualified labor available to compete federal and federally assisted construction projects. In addition, the Executive Order itself implies that OFCCP does not have jurisdiction over private construction projects.

OFCCP's exercise of such broad jurisdiction is unlawful also because the agency disregarded the Fifth Amendment, Title VII, and the Administrative Procedures Act when it imposed utilization goals and specific affirmative action obligations on private projects distant from a contractor's federal or federally assisted projects.

In any event, OFCCP's exercise of jurisdiction over private construction projects will not, in the end, increase the number of women and minorities who are on those projects. As already noted, the construction industry is intensely competitive. The added cost of satisfying OFCCP will continue to drive federal and federally assisted construction contractors out of the market for private projects.

The Federal Administrative and Property Services Act of 1949 does not authorize sex and race conscious goals. The law is a rather simple, general "housekeeping" statute, one designed only to standardize and economize the federal procurement effort. OFCCP's imposition of such goals on federal and federally assisted construction contractors exceeds the scope of its authority.

When OFCCP imposed specific numerical goals on construction contractors, the agency ignored not only the statutory boundaries of its authority, but also its own requirement that such goals reflect appropriate data. The agency based its female goal on improperly aggregated data, and at least in part on its entirely irrelevant desire to settle ongoing litigation. The agency also based its minority goals on improperly aggregated data.

Even when acting within the scope of its authority OFCCP has made no effort to minimize the regulatory burden. To the contrary, the agency has imposed clearly excessive recordkeeping and reporting requirements.

OFCCP's current regulations require construction contractors to take sixteen affirmative action steps, and thereby reach, at least in theory, an established goal for the utilization of women and minorities. The agency's Compliance Manual, which is intended to guide field personnel, and which in fact determines what will satisfy such personnel, subdivides the sixteen steps into one hundred seventeen substeps. As if requiring these discrete substeps were not in itself enough, the agency then requires that each contractor fully document each substep. OFCCP field personnel have demanded that construction contractors sign conciliation agreements for failing to fully document any one of the one hundred seventeen substeps. The agency requires voluminous files of letters, minutes, diaries, memoranda, telephone logs, and the like.

In addition to this truly shocking recordkeeping requirement, OFCCP has imposed a heavy reporting requirement. Each month, construction contractors must file an employment utilization report. In this CC-257 report, construction contractors must specify their female and minority utilization in each craft on all projects, including all private projects, in the area of their federal or federally assisted project. But for the intervention of the Office of Management and Budget, construction contractors would have to report on even those private projects distant from their federal or federally assisted projects.

OFCCP has also poorly managed its current program. The agency has had trouble coordinating its regional and area offices. The agency has also had trouble restraining its field personnel. Among federal contractors, these personnel have a reputation for arrogance.

Neither OFCCP's regulations, nor its Compliance Manual, even refers to the CC-257 which construction contractors must file each month. An AGC survey of federal and federally assisted construction contracts, for different parts of the nation, revealed that even these contracts do not refer to the CC-257. As a result, construction contractors must rely on some kind of informal notification of one of their most fundamental obligations.

In November of 1980, after receiving numerous letters and calls, and concluding that confusion surrounded the CC-257, AGC sent letters to OFCCP's ten regional offices and to the agency's national office.

In the letters, AGC asked only basic questions, such as where construction contractors should file their reports, who should file subcontractors' reports, and whether OFCCP intended the reports to cover laborers. The various offices required five months to reply.

When they did reply, the offices revealed that OFCCP was itself as confused as the construction contractors. Boston, Kansas City and Denver would only refer AGC to the national office. San Francisco stated that it could not yet answer the questions, but that it would do so "as soon as possible." Atlanta, Dallas, Philadelphia, Seattle and the national office advised AGC that contractors should submit their reports directly to the relevant area office. However Chicago and New York simply referred AGC to the CC-257 for an answer, but the CC-257 does not itself provide an answer. The form states only that "[t]he prime contractor shall submit a report...to the Federal compliance agency that has Executive Order 11246 responsibility." The national office advised AGC that each general contractor and each subcontractor should independently submit its own report. However, Dallas, Philadelphia and Seattle advised AGC that general contractors should collect the reports from their subcontractors, and then submit the reports on the latter's behalf. Chicago and New York again referred AGC to the CC-257, which also advises that general contractors should collect the reports from their subcontractors, and then submit the reports on the latter's behalf. Atlanta's reply was ambiguous. Finally, Dallas, Philadelphia, Seattle and the national office advised AGC that the agency intended the reports to cover laborers. However, Atlanta replied: "Inasmuch as laborers is [sic] not considered a construction skilled craft, no reporting requirement exists for female and minority utilization of laborers."

OFCCP has had similar trouble restraining its field personnel. In theory, a construction contractor's ultimate obligation is merely to make certain good faith efforts. The utilization goals are reference points to guide the compliance officer who must determine whether a contractor has made good faith efforts. In practice, a construction contractor must either meet its utilization goals or face a demand for a conciliation agreement, because the utilization goals are seen by OFCCP field personnel as absolute, inflexible quotas. In the language of several conciliation agreements written by OFCCP, the utilization goals are "required goals."

AGC does not have the facilities to make an exhaustive study of the conciliation agreements which field personnel have demanded. However, it has reviewed several agreements finalized during the fourth quarter of the 1980 fiscal year. The agreements confirm that field personnel have little interest in determining whether a construction contractor has in fact made good faith efforts. The agreements do not even address the question of good faith.

Field personnel imposed conciliation agreements on even those contractors with good records. One contractor had a minority utilization goal of 20.5% to 22%. Field personnel imposed a conciliation agreement on this contractor even though it had achieved the minority utilization rates of 19%, 13%, 18% and 16.2% during the four months under review. The conciliation agreement does not even suggest why the efforts which produced these utilization rates were inadequate.

Another contractor had a minority utilization goal of 35%. OFCCP required a conciliation agreement because the contractor had achieved a minority utilization rate of only 28.6%. The same contractor, and indeed all construction contractors, had a female utilization goal of 5.0% for the year beginning on April 1, 1980, and ending on March 31, 1980. My November of 1979, the contractor had achieved a female utilization rate of 3.1%. Whether the contractor could achieve the 5% utilization goal for the full year remained to be seen. Nevertheless, field personnel cited the contractor for underutilizing women.

A third contractor had a minority utilization goal of 28%. Field personnel imposed a conciliation agreement on this contractor even though it had achieved minority utilization rates of 26%, 17% and 17% during the three months under review.

Another contractor had achieved a female utilization rate of 4.2% by December of 1979. Once again, whether the contractor could achieve the 5% utilization goals for the full year ending March 31, 1980, remained to be seen. Nevertheless, field personnel also cited this contractor for underutilizing women.

A fifth contractor had a minority utilization goal of 25%. Although it achieved minority utilization rates of 18%, 19%, 18%, 19% and 17% during the five months under review, field personnel required the contractor to sign a conciliation agreement.

A contractor who had a minority utilization goal of 28% achieved rates of 17%, 22%, 19%, and 19% during the four months under review. Nevertheless, field personnel also required this contractor to sign a conciliation agreement.

AGC believes that these conciliation agreements are typical. The agreements demonstrate the general attitude of OFCCP field personnel that utilization goals are absolute, inflexible quotas, despite the position consistently taken by the national office -- that federal contractors' ultimate obligation is only to make certain good faith efforts.

OFCCP's filed personnel have also otherwise abused their authority. They have required deficient contractors to meet harsh and wholly unrealistic make-up goals. One conciliation agreement shows that a contractor had failed to meet its 5% female utilization goal in four crafts: carpenters, laborers, cement finishers and electricians. The conciliation agreement, which is from the Chicago area, required the contractor to achieve "make-up" goals of 8.8%, 9.4%, 9.4% and 9.4%, respectively. For some unexplained reason, the conciliation agreement also required the contractor to assist an independent minority or female contractor in preparing or reducing a price quotation.

Another conciliation agreement states that a contractor had failed to meet its minority goal for carpenters, and its female goal for carpenters, laborers and cement masons. The conciliation agreement required the contractor to do the following:

> Hire one (1) minority carpenter for 10 1/2 months (or as long as it takes to make up 1,704 deficit hours).
>
> Hire one (1) female carpenter for 6 1/2 months (or as long as it takes to make up 1,012 deficit hours).
>
> Hire two (2) female laborers for 7 months each (or as long as it takes to make up 2,138 deficit hours).
>
> Hire one (1) female cement mason for 1 1/2 months (or as long as it takes to make up 197 deficit hours).

The conciliation agreement further provided:

> Recruited workers will be provided with permanent employment as available in an effort to make up the deficit hours (4,051). Every effort will be made to achieve the make up hours by the end of each stated timeframe. This timetable may be extended if opportunities do not occur to achieve make up hours. It must also be clearly understood that deficit hours must be made up over and above the applicable goals for each identified trade in

> the Chicago covered area. If, in the event, contractor has no work in the Chicago area, deficit hours will be made up in those area in which the contractor has work. Any additional accumulated deficit hours will also be made up in the same manner and like timeframes. This Conciliation Agreement shall remain in full force and effect until such time as [the contractor] is found by OFCCP to have met all the terms of this Agreement.

Once again, the examples illustrate that many compliance officers are more interested in playing the numbers game than in encouraging the kind of good faith efforts which "affirmative action" should denote.

The new Administration has repeatedly stated that it intends to exercise greater control over OFCCP's field personnel. AGC applauds the efforts, but remains highly skeptical. Just last month, one area office attempted to reopen an investigation which it had formally and officially concluded, in the contractor's favor, seven months earlier. The investigation was of a complaint filed no later than April of 1979. The area office receded only after the contractor retained outside counsel.

In June of this year, another office demanded a letter of commitment from a contractor which had not met its female utilization goal for several crafts between September of 1980 and March of this year. In the process, the field personnel utterly disregarded their first letter to the contractor, in which they stated that the compliance review would cover only the period between May and November of 1980. The field personnel, who gave the contractor only five days to respond, had not even afforded the contractor an opportunity to demonstrate that it had nevertheless made the mandated good faith efforts between September of 1980 and March of this year. After several letters and phone calls, in which the area office admitted that the contractor had in fact made excellent efforts, and that the demand for a letter of commitment rested solely on the raw statistical data, the area office finally dropped its demand for a letter of commitment, and concluded the compliance review in the contractor's favor.

The need for Congressional oversight of OFCCP's activities is particularly acute. As AGC has repeatedly explained, OFCCP's current construction program is both poorly conceived and poorly managed. Further, OFCCP has repeatedly turned a deaf ear to any kind of constructive criticism.

When OFCCP first announced its intention to exercise jurisdiction over all private construction projects, AGC strenuously objected. AGC explained that the agency does not have such jurisdiction, and that in any event, the agency's exercise of such broad jurisdiction would not produce the desired results. OFCCP ignored AGC's objections.

When OFCCP first proposed its female utilization goals, AGC estimated the number of qualified female construction workers needed to satisfy the goals. AGC then estimated the number of women already qualified for construction work, and the number of women coming out of existing training and apprenticeship programs. On the basis of these estimates, AGC determined that contractors could not meet the proposed goals during the proposed timeframe. In fact, contractors could not meet the goals, for several additional years, even if all trainees and apprentices were women. AGC so notified OFCCP, but to absolutely no avail. Only later did AGC learn that OFCCP had based its female utilization goals, at least in part, on its entirely irrelevant desire to settle ongoing litigation.

When OFCCP first proposed its current minority utilization goals AGC made similar efforts to determine whether these goals fell within the range of the feasible. AGC concluded that many of the goals did not, primarily because OFCCP assumed wholly unrealistic commuting patterns for construction workers. AGC notified OFCCP again to no avail.

During the previous administration, AGC worked with women's and minority groups in a joint effort to revise OFCCP's Compliance Manual. As already noted, the Compliance Manual determines in fact, if not in legal theory, what a contractor must undertake. OFCCP shunned each and every proposal for revision.

AGC could cite numerous other examples. For over a decade, OFCCP has lived in an ivory tower. The agency has only the vaguest understanding of how construction contractors are different from service and supply contractors. OFCCP does not understand the vital need for construction contractors who work with collective bargaining agreements to maintain good relations with construction unions. Nor does the agency appreciate the intensity of the competition among construction contractors, and accordingly, the severe effects of its recordkeeping and reporting requirements. Nor does the agency understand the far more fundamental need to educate and train the women and minorities who are genuinely interested in construction work.

AGC remains convinced that OFCCP's current construction program requires substantial revision. The Reagan Administration should rescind Executive Order 11246, and substitute an executive order which emphasizes and encourages education and training. The Administration should build on the mutual interests of women, minorities and federal contractors, and not simply inflame distrust of each other.

On August 25, 1981, OFCCP proposed numerous revisions of its regulations. On the whole, the proposals are very discouraging. They do not address a number of problems with OFCCP's current program, much less the basic need to redirect that program. Once again, the only meaningful affirmative action is that which equips women and minorities fairly to compete in the labor market.

The August 25 proposals suggest that OFCCP does not yet fully appreciate the pressing need to define sharply both the authority of field personnel, and the obligations of federal contractors. The proposals do not reach much of the vague and confusing language which has found its way into the regulations. In fact, some of the proposed new language is itself vague and confusing. OFCCP should fully appreciate that field personnel and federal contractors must settle most compliance questions without the benefit of lengthy hearings and detailed briefs. The vague and confusing language encourages field personnel to take aggressive positions, and contributes to wholly unnecessary misunderstandings.

The recent proposals also reflect a relative disinterest in the construction industry. The proposals to revise the service and supply regulations reflect far more though and careful analysis than do the proposals to revise the construction regulations. OFCCP has proposed a very substantially higher threshold for full coverage of service and supply contractors than for construction contractors. The agency has similarly proposed an 80% rule, an abbreviated affirmative action program, and a five-year affirmative action program for service and supply contractors. The agency has made not comparable efforts to ease the regulatory burdens of construction contractors, who are not fixed-base and therefore face recruitment and employment problems far more serious than those facing service and supply employers.

A special AGC task force is now studying the many ways in which existing education and training programs can work to the particular advantage of women and minorities. AGC has already developed training programs which allow each trainee to advance at his or her own rate. AGC has also already made special efforts to validate selection procedures. With AGC's assitance, OFCCP could develop a construction program which would bring greater numbers of women and minorities into the pool of qualified applicants. OFCCP's current construction program simply obscures the need to do so.

The Committee on Labor and Human Resources could perform a great service by simply pointing out to OFCCP that construction contractors have a genuine interest in qualified construction labor, an interest which is at least as great as the interest of women and minorities in breaking down any barriers to the equality of employment opportunity. AGC urges this committee to take whatever action is necessary to compel OFCCP to abandon harassment tactics, and to begin the serious business of encouraging the education and training of the women and minorities who are genuinely interested in construction work.

Attachments: Letter to James W. Cisco, dated September 14, 1981
Letter to James W. Cisco, dated October 16, 1981

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

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October 16, 1981

Mr. James W. Cisco, Acting Director
Division of Program Policy
Office of Federal Contract
Compliance Programs
Room C-3324
U. S. Department of Labor
200 Constitution Avenue
Washington, D. C. 20210

RE: August 25 Notice of Proposed Rulemaking
(46 Fed. Reg. 42967 (1981))

Dear Mr. Cisco:

The Associated General Contractors of America (AGC) and its 113 chapters represent over 30,000 construction firms, including 8,500 of the nation's leading general contractors. These construction firms employ 3.5 million individuals and account for 80 percent of the nation's contract construction of commercial buildings, highways, and utilities. Nearly $200 billion is involved.

AGC has carefully reviewed the proposals which OFCCP published on August 25, 1981. AGC understands that these proposals are neither designed nor intended to address the questions which OFCCP raised in its Advance Notice of Proposed Rulemaking of July 14, 1981. Nevertheless, for the record, AGC opposes any current or proposed language which assumes that OFCCP has the authority to require back pay or any other individualized or retrospective relief. AGC strongly opposes any language which assumes that OFCCP has jurisdiction over private construction projects, and particularly those private projects outside the area in which a construction contractor is performing federal or federally assisted work. As AGC fully explained in the comments which it submitted on September 14, 1981, and as AGC has pointed out on many other occasions, OFCCP does not have jurisdiction over such projects. Finally, AGC objects to OFCCP's construction utilization goals.

AGC similarly opposes any language which assumes that OFCCP has the authority to impose liability on a federal contractor merely for perpetuating the effects of past discrimination. The decisions of the Supreme Court, the Fifth Circuit, and more recently, the D. C. Circuit, render clear that OFCCP does not have such authority.

I. Proposed Revisions of Part 60-4

A. Threshold for Full Coverage of Construction Contractors

The proposed new threshold for full coverage of federal and federally assisted construction contractors is far too low. Adoption of the threshold would relieve only a tiny fraction of those who contract directly with either the Federal government or the recipients of federal funds. Few direct contracts involve less than $50,000. Few direct contractors would not accumulate the requisite 20,000 hours of craft work. A contractor working ten hours a day, six days a week, would exceed 20,000 hours of craft work, in six months, with only 13 employees.

The proposed new construction threshold is only a small fraction of the proposed new threshold for full coverage of service and supply contractors. The latter would have to comply with Revised Order No. 4 only if they had (1) a contract of $1,000,000 or more, and (2) 250 employees. In any six months, 250 employees would normally work 260,000 hours.

The vastly lower threshold for construction contractors is totally unjustified. The reverse would be easily understandable, i.e., a much higher threshold for construction as compared to service and supply industries. The construction industry is more labor intensive than most other industries. Nevertheless, construction contractors would have to accumulate only 7.7% of the hours which others would have to accumulate. One purpose of OFCCP's program is to ensure that all groups enjoy the collateral benefits of federal expenditures. Because the construction industry is labor intensive, and construction wages are high, the collateral benefits of a construction contract of any given size are far greater than the collateral benefits of a service or supply contract of the same size. Nevertheless, OFCCP would fully cover a construction contractor who had signed a contract for only 5% of the minimum dollar threshold for full coverage of a service or supply contractor.

AGC must question how thoroughly OFCCP has researched the proposed new construction threshold. In its Preliminary Regulatory Impact Analysis, the agency devotes relatively little attention to this threshold. The agency estimated the effect, on both employer and employee coverage, of a number of different service and supply thresholds. The agency made no similar study of different construction thresholds.

In any event, OFCCP should clarify the proposed language. In determining whether a construction contractor had employed craft workers for the requisite number of hours, would the agency include employment on private projects? Would the agency include employment outside the area of the federal or federally assisted work?

B. Section 60-4.1

OFCCP should revise the second paragraph of this section. Part 60-4 applies to only those construction contractors who meet the $10,000 threshold. See §60-1.4(a)(1). Whether "the construction work is necessary in whole or in part to the performance of a nonconstruction contract" is not the sole question.

C. Section 60-4.2(b)

See comment on §60-4.1, above.

D. Section 60-4.2(d)

Part II of the Notice of Requirement For Affirmative Action expresses utilization goals "in percentage terms for the Contractor's aggregate work force in each trade on all construction work...." (Emphasis added). However, Part II also provides: "Compliance with the goals will be measured against the total hours performed." OFCCP should clarify the relationship between total hours in each trade and total hours performed. As they stand, the two provisions are contradictory. The latter is clearly more reasonable.

Elsewhere, Part II provides that a construction contractor's "hours of minority and female employment and training must be substantially uniform throughout the length of the contract...." OFCCP should define "substantial uniformity," bearing in mind that much if not most of construction work is highly seasonal, and that the construction workforce is highly unstable. Such is the nature of the construction process.

AGC supports elimination of the obligation to notify the Director, in writing, and within ten days, of any construction subcontract in excess of $10,000. In fact, AGC supports elimination of any and all paperwork obligations which do not materially contribute to equality of employment opportunity.

E. Section 60-4.3(a)

OFCCP should delete all of Specification 4. The entire paragraph is either redundant or merely explanatory.

If adopted as proposed, Specification 5 would provide: "Neither the provisions of any collective bargaining agreement, nor the failure by a union...to refer either minorities or women shall excuse the Contractor's obligations...." Specification 7b would require contractors to "[a]ctively seek and utilize alternative recruitment and labor sources...whenever traditional sources of labor are unable to supply sufficient numbers of minorities and women...." Finally, Specification 7i would require contractors to "[e]nsure that seniority practices...do not have a discriminatory effect...." OFCCP should revise all three Specifications. The agency does not have jurisdiction over labor unions, and cannot require employers to breach their collective bargaining agreements. The Labor-Management Relations Act creates rights and obligations which neither an employer nor OFCCP is privileged to ignore and which the National Labor Relations Board and the courts regularly enforce. In addition, the courts have ruled, for independent reasons, that OFCCP does not have the authority to require employers to dismantle bona fide seniority systems.

OFCCP should delete the second sentence of Specification 6. The requirement only hinders efforts to qualify greater numbers of women and minorities for construction work.

OFCCP should similarly delete the reference to "maximum results" from the second sentence of Specification 7. The reference implies that a contractor's ultimate obligation is to reach a prescribed numerical balance, and not merely to make certain good faith efforts. The reference is therefore inconsistent with OFCCP's repeated assertions that its utilization goals are not inflexible quotas. The second sentence of Specification 7 should read: "The Contractor is in compliance with these specifications if it is making good faith efforts to implement each specification, and thereby achieve the desired results."

AGC strongly supports the effort to modify the third sentence of Specification 7. It supports deletion of the requirement that each construction contractor fully document its efforts to comply with each specification. This burdensome requirement has contributed little if anything to equality of employment opportunity. However, AGC cannot fully support the proposed substitution of a requirement that contractors "be able to demonstrate fully" their affirmative action efforts. The proposed new language is too vague to provide either compliance officers or federal contractors with any meaningful guidance.

OFCCP should make relatively minor revisions of Specification 7a. Construction contractors, who typically work on multiemployer sites, cannot "ensure" that no one will engage in harassment, intimidation or coercion. OFCCP should revise the first sentence to require contractors to make good faith efforts to maintain the desired environment. OFCCP should revise the third sentence to confirm that a contractor is responsible only for the conduct of its own personnel. The reference to "all foremen, superintendents, and other on-site supervisory personnel" is at least ambiguous.

AGC supports the proposed revision of Specification 7b. AGC would only caution that the proposed new language is vague. How "active" would a contractor have to be? If possible, OFCCP should clarify its intent.

OFCCP should delete the second sentence of Specification 7c, because the sentence is at least largely redundant. The first sentence independently requires a record of actions taken with respect to female and minority applicants for employment.

OFCCP should delete Specification 7d. The agency's effort to require federal contractors to police labor unions is highly inappropriate, particularly in light of the agency's lack of jurisdiction over labor unions.

AGC supports the proposed revisions of Specifications 7f and 7g. AGC also supports the proposed deletions of what are currently Specifications 7h, 7j, 7k, 7l, 7n, 7o, and 7p. The revisions and deletions would streamline the affirmative action effort without subverting the substantive rights of the federal government.

The comments on the third sentence of Specification 7a also applies to Specification 7g. OFCCP should revise Specification 7g to confirm that a contractor is responsible only for the conduct of its own personnel.

OFCCP should delete the second sentence of Specification 7h. The sentence imposes an unnecessary and normally perfunctory written notification requirement.

OFCCP should substantially revise Specification 8. The Specification purports to encourage participation in voluntary associations. At the same time, it imposes five conditions on such participation. Moreover, it provides that the failure of an association to fulfill its obligations shall not, under any circumstances, excuse a contractor's related failure to fulfill its obligations. OFCCP should substitute a specification which genuinely encourages participation in voluntary associations. Retention of only the first sentence would be one possibility.

OFCCP should delete the last sentence of Specification 9. The sentence suggests that a contractor must meet a certain goal for the employment of female minorities. OFCCP has established no such goal.

OFCCP should add the following language to Specification 10:

> Utilization goals are not inflexible quotas. The goals are designed and intended merely to assist in evaluating a contractor's good faith efforts to achieve a representative work force. These specifications, and the accompanying utilization goals, shall not obligate a contractor to hire unnecessary personnel, or to hire any person who is not qualified by valid qualification standards, or to grant a preference to a less qualified person over a more qualified person where qualifications are measured by selection procedures validated pursuant to 41 CFR Part 60-3.

OFCCP should delete the first sentence of Specification 13. The sentence improperly substitutes the achievement of maximum results for the exercise of good faith. The agency should also revise the last sentence. The sentence should refer to 41 CFR §§60-1.64, 60-1.65. The agency has no reason to single out construction contractors for particularly strict compliance reviews.

F. Section 60-4.8

OFCCP should delete this section and otherwise provide that the agency shall treat the deficiencies of construction contractors just as it treats other deficiencies. *See* comment on §60-4.3(a), above.

II. Proposed Revisions of Part 60-1

A. Section 60-1.1(b)

If adopted as proposed, this section would state: "Failure of a contractor or applicant to comply with any provision of the regulations in this part shall be grounds for the imposition of any or all the sanctions authorized by the Order or by the regulations implementing Sections 402 and 503." This implies encouragement to field personnel to abuse their authority -- to threaten contractors with severe sanctions for failure to satisfy minor obligations. OFCCP should delete the quoted language.

B. Section 60-1.3

The definition of "applicant" is far too broad, and far too likely to engender dispute. Those who merely indicate an interest in a position, and do not take some kind of further, affirmative step, are not entitled to protection. Particularly in the construction industry, where wages are high, but the work is both dirty and strenuous, many who merely indicate an interest are not bona fide applicants for employment. The definition will engender dispute because it is so vague. Whether an individual has "indicated an interest" will often be very difficult to determine.

OFCCP should revise the definition to read: "Applicant also means a person who has taken all those steps which a contractor's practice or express policy renders necessary for such person's active consideration for hiring, promotion, or any other employment opportunity."

C. Section 60-1.5(a)

AGC objects to OFCCP's exercise of jurisdiction over those financial institutions which merely purchase federal deposit or share insurance. The most commonly recognized basis for the Executive Order is the Federal Property and Administrative Services Act of 1949, which authorizes the President only to promote economy and efficiency in federal procurement. Federal deposit and share insurance have nothing to do with federal procurement. Such insurance is sold, and not procured, by the federal government.

D. Section 60-1.21(a)

Because OFCCP does not have jurisdiction over labor unions, the agency cannot dictate the terms of collective bargaining agreements. OFCCP should revise the second sentence to read: "The contractor shall make good faith efforts to ensure that any written collective bargaining agreement with any employee representative is not inconsistent with these regulations."

OFCCP should also clarify the reference, in the first sentence, to "this subject area." What is "this subject area?"

E. Section 60-1.23

AGC supports OFCCP's decision to drop any reference to the "comparable worth" theory.

F. Section 60-1.25

The new section on sexual harassment has two fundamental flaws. Subsection (a) would establish highly subjective standards. "Unwelcome" sexual advances and conduct "of a sexual nature" would be unlawful if they "unreasonably" interfered with work performance or created an "intimidating, hostile or offensive" work environment. Subsection (b) would impose unjustifiably strict liability.

Such subjective standards are very difficult to apply. They are fertile ground for costly litigation. OFCCP should tighten the language of subsection (a).

Under subsection (b), a contractor would be strictly liable for the acts of its officials, managers, and supervisors. Such strict liability is unjustified because it will not reduce sexual harassment. A contractor cannot, in any event, prevent what it cannot expect. OFCCP should redraft subsection (b) to parallel subsection (c).

G. Section 60-1.40

AGC strongly supports the proposal to drop coverage of construction contractors' non-craft personnel. Such coverage would impose grossly disproportionate paperwork and related costs on construction contractors. The costs would be disproportionate both to the benefits to protected groups, and to the costs imposed on comparable service and supply contractors.

H. Section 60-1.43

Covered contractors are entitled to know precisely what steps the Department of Labor will take to ensure confidentiality. Expressions of "sensitivity" will not suffice.

I. Section 60-1.48

OFCCP should not so encumber the fundamental right to a hearing. The agency should not condition the right on compliance with its demands. Such compliance will sometimes cause irreparable harm. In addition, the contractor should have more than ten days to request a hearing. Thirty days is the only reasonable minimum. Finally, all hearings should be on the record, and before the Director.

J. Section 60-1.51

OFCCP should revise this section to read as follows:

> The provisions of this chapter shall not justify discrimination against any qualified employee or applicant for employment on the basis of race, color, religion, sex, national origin, handicap, or veteran status. Nor shall they justify treating utilization goals as inflexible quotas. Such goals are designed and intended merely to assist in evaluating a contractor's good faith efforts to achieve a representative work force. The provisions of this chapter shall not obligate a contractor to hire unnecessary personnel, or to hire any person who is not qualified by valid qualifications standards, or to grant a preference to a less qualified person over a more qualified person where qualifications are measured by selection procedures validated pursuant to 41 CFR Part 60-3.

K. Section 60-1.60

OFCCP should delete the parenthetical reference in the last sentence of subsection (a). The agency should then add a sentence which states precisely when the agency will conduct a desk audit.

AGC applauds the proposal to delete the last sentence of subsection (c). The deletion can only encourage the conciliation of compliance questions.

L. Section 60-1.62

AGC opposes the proposal to permit third parties to file complaints. The change would only encourage frivolous complaints, which are already far too numerous. OFCCP should accept only those complaints of class-type discrimination which (1) are signed by a victim of such discrimination, or his/her representative, (2) identify the alleged discrimatees to the extent known, and (3) include the other information required by subsection (a).

AGC supports the other proposed revisions of subsection (a).

M. Section 60-1.63

The Department of Justice and the EEOC have the resources and expertise to address questions of discrimination. OFCCP should contribute what these other agencies cannot contribute -- an attentiveness to affirmative action. OFCCP should redraft the section to require referral of all complaints to either the Department of Justice or the EEOC.

N. Section 60-1.64

Subsection (a) implies that all compliance reviews will uncover deficiencies. Instead of referring to "the" deficiencies, the subsection should refer to "any" deficiencies.

Subsection (a) also implies that a letter of commitment, conciliation agreement, or consent decree, will be necessary to correct any deficiency, however minor. Such an assumption is unwarranted, and should be clearly discouraged, given the purely technical nature of many possible deficiencies. See §60-1.65(d).

OFCCP should revise subsection (d)(1) to permit use of a notice of violation only where a contractor has at least allegedly engaged in intimidation, or interfered in bad faith with the orderly completion of a compliance review. The subsection should also afford a contractor at least 15 days in which to respond.

OFCCP should delete subsection (d)(2). The agency should have only one procedure for dealing with violations of conciliation agreements, letters of commitment, or consent or other decrees. Subsection (f) should always control.

O. Section 60-1.65

OFCCP should make another effort to define "major substantive violations." The examples given in subsection (a) leave much to be desired. OFCCP should delete the first example unless or until it substantially revises its affected class analysis. OFCCP cannot penalize a contractor for maintaining policies which merely perpetuate the effects of past discrimination. The agency should also revise the fourth example, which implies that any failure to meet goals amounts to a substantial deviation from an affirmative action program. The implication is inconsistent with OFCCP's repeated assertions that a contractor's ultimate obligation is only to make certain good faith efforts. The implication is that utilization goals are absolute, inflexible quotas.

P. Section 60-1.68

OFCCP should redraft subsection (a) to confirm that the agency must issue a show cause notice, and engage in conciliation, before referring a matter to the Office of the Solicitor. See §§ 60-1.64, 60-1.60(c). *Cf.* §60-1.68(d).

III. Proposed Revisions of Part 60-30

A. Section 60-30.32(c)

AGC strongly supports the proposal to afford contractors the right to object to expedited hearing procedures. Such procedures can prejudice a contractor's case.

IV. Conclusion

On September 14, 1981, AGC submitted comments on OFCCP's back pay policy, its exercise of jurisdiction over private construction projects, and its utilization goals for construction contractors. In those comments, AGC explained that OFCCP's current construction program is fundamentally misdirected. The program equates affirmative action with attainment of numerical goals. At the same time, the program virtually ignores the need to educate and train the women and minorities who are genuinely interested in construction work.

AGC remains convinced that OFCCP's current construction program requires substantial revision. The Reagan Administration should rescind Executive Order 11246, and substitute an executive order which emphasizes and encourages education and training. The Reagan

Administration should build on the mutual interests of women, minorities and federal contractors.

OFCCP should recognize that it cannot reap what it has not sown. The agency can ensure equality of employment opportunity only by ensuring that women and minorities have the knowledge and skills which are required to compete in the labor market.

On the whole, the proposed revisions are very discouraging. They do not address a number of problems with OFCCP's current program, much less the basic need to redirect that program. As AGC has already explained, the only meaningful affirmative action is that which equips women and minorities fairly to compete in the labor market.

The August 25 proposals do not reflect an appreciation of the pressing need to define sharply both the authority of field personnel, and the obligations of federal contractors. The proposals do not reach much of the vague and confusing language which has found its way into the regulations. In fact, some of the proposed new language is itself vague and confusing. OFCCP should more fully appreciate that field personnel and federal contractors must settle most compliance questions without the benefit of lengthy hearings and detailed briefs. The vague and confusing language encourages field personnel to take aggressive positions, and contributes to wholly unnecessary misunderstandings. Further, the recent proposals appear to reflect a disinterest in the construction industry. The proposals to revise the service and supply regulations reflect far more thought and careful analysis than do the proposals to revise the construction regulations. OFCCP has proposed a substantially higher threshold for full coverage of service and supply contractors. The agency has similarly proposed an 80% rule, an abbreviated affirmative action program, and a five-year affirmative action program, for service and supply contractors. The agency has made no comparable efforts to ease the regulatory burdens of construction contractors, who are not fixed-base and therefore face recruitment and employment problems far more serious than those facing fixed-based employers.

A special AGC task force is now studying the many ways in which existing education and training programs can work to the particular advantage of women and minorities. AGC has already developed training programs which allow each trainee to advance at his or her own rate. AGC has also already made special efforts to validate selection procedures. With AGC's assistance, OFCCP can develop a construction program which will bring greater numbers of women and minorities into the pool of qualified applicants. The current OFCCP construction program simply obscures the need to do so.

Please do not hesitate to write or call with any questions. AGC remains fully committed to equality of employment opportunity.

Sincerely,

Hubert Beatty

Hubert Beatty
Executive Vice President

Enclosure: September 14 AGC Comment Letter

cc: The Honorable Raymond J. Donovan
T. Timothy Ryan
Ellen M. Shong

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

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September 14, 1981

Mr. James W. Cisco, Acting Director
Division of Program Policy
Office of Federal Contract
Compliance Programs
Room C-3324
U.S. Department of Labor
200 Constitution Avenue
Washington, D.C. 20210

Dear Mr. Cisco:

The Associated General Contractors of America (AGC) and its 113 chapters represent over 30,000 construction firms. Among these firms are 8,500 of the nation's leading general contractors, contractors responsible for the employment of 3.5 million individuals, for the stability of a $200 billion market, and for 80 percent of the nation's contract construction of commercial buildings, highways, and utilities.

AGC has carefully reviewed your Advanced Notice of Proposed Rulemaking (ANPR) of Tuesday, July 14, 1981 1/ and respectfully submits the following comments.

Integrating equality of employment opportunity into the structure of American life is not unlike erecting a modern building. The process has its distinct phases. To its credit, OFCCP has cleared the site. The agency has levelled archaic attitudes. To its more serious discredit, the agency has yet to recognize that now is the time to proceed to the next phase. Now is the time to lay the foundation for the integrated structure. OFCCP must identify the mutual interests of women, minorities, and federal contractors, and create a climate of cooperation.

As AGC has already advised the Secretary of Labor, the only meaningful affirmative action is that which equips women and minorities fairly to compete in the labor market.

1/ *See* 46 Fed. Reg. 36213 (1981).

The development of an entirely new program should begin with the recission of Executive Order 11246, and continue with the drafting of an executive order which emphasizes and encourages education and training, and expressly recognizes the Department of Labor's need to approach federal contractors with a positive, cooperative attitude.

Notwithstanding its conviction that OFCCP's "enforcement" program is fundamentally misdirected, AGC submits the following comments on back pay, on OFCCP's exercise of jurisdiction over private construction projects, and on OFCCP's female and minority utilization goals for the construction industry. These comments underscore the need for an entirely new program.

I. Back Pay

AGC maintains that OFCCP's back pay policy has two serious flaws. First, OFCCP has no authority to require back pay. Second, the agency's back pay policy is unnecessary for the protection of women and minorities.

The most commonly recognized basis for Executive Order 11246 is the Federal Property and Administrative Services Act of 1949, which authorizes the President to promote economy and efficiency in federal procurement. 2/ Supporters of the current program, and some courts, have reasoned that the program tends to increase the supply of qualified labor, and thereby serve the statute's purposes. 3/

Back pay does not increase the supply of qualified labor or otherwise promote economy and efficiency in federal procurement. Back pay does not provide women or minorities with skills. It tends to increase, and not to reduce, federal procurement costs. 4/ OFCCP's efforts to require back pay are therefore beyond the scope of its authority. 5/

2/ 40 U.S.C. § 471 *et seq.* (1976)(Federal Procurement Act). *See Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). *See also U.S. v. New Orleans Public Service, Inc.*, 553 F.2d 459 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978); *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967).

3/ *See* note 2, *supra*.

4/ The same may well be true of OFCCP's utilization goals. *See* Walker, *The Exorbitant Cost of Redistributing Social Injustice: United Steelworkers v. Weber*, 21 Bos. Col. L. Rev. 1 (1979).

5/ *Cf. Liberty Mutual Ins. Co. v. Friedman*, 639 F.2d 164 (4th Cir. 1981).

OFCCP has argued that back pay at least indirectly serves the purposes of the Federal Procurement Act. The agency has argued that the prospect of back pay liability is necessary to ensure compliance with the general requirement that contractors avoid discrimination, and thereby maintain access to all segments of the qualified labor market. However, in the process, OFCCP has overlooked Title VII of the Civil Rights Act of 1964 6/ which independently prohibits employment discrimination against women and minorities. Employers which practice discrimination will in any event run the risk of back pay liability. OFCCP has also overlooked the threat of debarment. The consequences of debarment are normally so great that the additional threat of back pay liability pales into insignificance.

The back pay policy is also inconsistent with recognition that the Executive Order is for the benefit of the federal government, and through the federal government, the general public. The Executive Order does not expressly authorize back pay or any other individualized relief. It is not for the benefit of individual women or minorities. 7/ Numerous courts have held that individuals cannot sue employers under the Executive Order. 8/

6/ 42 U.S.C. § 2000e et seq. (1976)(Title VII).

7/ See United States v. East Texas Motor Freight, 564 F.2d 179, 185 (5th Cir. 1977) ("[N]othing in the Order suggests an authority to direct...benefit(s) to third party discriminatees.").

8/ Bradford v. Peoples Natural Gas Co., Inc., 60 F.R.D. 432 (W.D. Pa. 1973); Jackson v. University of Pittsburg, 11 F.E.P. Cases 1233, 1236 (W.D. Pa. 1975); Racklin v. University of Pa., 386 F. Supp. 992, 1008 (E.D. Pa. 1974); Lewis v. FMC Corp., 11 F.E.P. Cases 31, 34 (N.D. Calif. 1975); Droughn v. FMC Corp., 74 F.R.D. 639 (E.D. Pa. 1977); Traylor v. Safeway Stores, Inc., 402 F. Supp. 871 (N.D. Cal. 1975); Gorman v. University of Miami, 414 F. Supp. 1022 (S.D. Fla. 1976). Cf. Farkas v. Texas Instruments, Inc., supra, at 673; Farmer v. Philadelphia Elec. Co., 329 F.2d 3,8 (3d Cir. 1964).

The back pay policy is similarly inconsistent with the Executive Order's focus on present and future conduct. The Executive Order expressly authorizes only prospective relief, focusing on present and future conduct, and not, as does back pay, on past conduct.

Finally, OFCCP's back pay calculations often conflict with the Supreme Court's declaration, under Title VII, that back pay shall run only to specific identifiable victims of unlawful discrimination -- to individuals who apply for specific openings, and are not selected, for discriminatory reasons. 9/ OFCCP often simply subtracts the average female or minority salary from the average male or white salary, and then multiplies the resulting figure by the number of protected class members, and the relevant number of years. OFCCP places the burden on the employer to prove that a particular individual was not qualified for, or would not have accepted, a particular opening. To that extent, the agency's back pay policy contravenes Title VII, and is therefore without legal effect. 10/

Significantly, OFCCP did not officially claim the authority to require back pay until 1977, more than a decade after the Executive Order's issuance. Since 1977, the OFCCP has vacillated, pointing at various times to different sections of the Executive Order as authority for its back pay requirement. The extensive lapse of time, and the agency's obvious uncertainty, independently suggest a lack of authority.

9/ Teamsters v. United States, 431 U.S. 324 (1977).

10/ Cf. United States v. Trucking Management Co., Nos. 79-2102, 79-2103 (D.C. Cir. August 14, 1981); United States v. East Texas Motor Freight System, note 7, supra.

OFCCP's back pay policy is unnecessary because Title VII already provides a basis for victims of discrimination to recover any lost wages or other lost income.

II. Private Construction Projects

From the late 1960's until October of 1980, OFCCP imposed utilization goals on (1) direct federal projects, (2) federally assisted projects, and (3) those private projects within the same labor market as the contractor's federal or federally assisted projects. In October of 1980, the agency extended utilization goals to all other private construction projects, however distant from any federal or federally assisted projects. 11/ The requirement created by this extension of goals has become known as the "7q" requirement.

AGC maintains that OFCCP's exercise of jurisdiction over private projects is unlawful. OFCCP does not have such jurisdiction. Even if it did, the agency's 7q requirement would not withstand close scrutiny. OFCCP imposed the 7q requirement in disregard of the Fifth Amendment, Title VII and the Administrative Procedure Act. 12/ Finally, OFCCP's exercise of jurisdiction over private projects will not, in the end, increase the number of women and minorities who are on those projects.

As already noted, the most commonly recognized basis for the Executive Order is the Federal Procurement Act. OFCCP's exercise of jurisdiction over private projects will not increase the supply of qualified labor available to complete federal and federally assisted projects. Nor will it otherwise promote economy and efficiency in federal procurement. OFCCP's exercise of jurisdiction over private projects, and its 7q requirement, are therefore unlawful. 13/

Supporters of the agency's exercise of such broad jurisdiction suggest that it at least collaterally serves the purposes of the Federal Procurement Act. They suggest that OFCCP's regulation of private projects tends to increase the overall supply of qualified labor, and therefore

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11/ 45 Fed. Reg. 65978 (1980).

12/ 5 U.S.C. § 551 *et seq.* (1976) (APA).

13/ *Cf. Liberty Mutual Ins. Co. v. Freidman*, note 5, *supra*.

also the supply of such labor available to complete federal and federally assisted projects. However, in the process, these supporters gloss over the absence of any hard data. The suggestion is superficially appealing, but nevertheless an exercise in conjecture. In addition, the suggestion presupposes the existence of a single, nationwide market for qualified construction labor. It assumes that OFCCP's regulation of a private project in Omaha, Nebraska, will increase the supply of qualified labor available to complete a federal courthouse in Louisville, Kentucky. OFCCP's regulation of a private project will at most increase the supply of qualified labor available to complete federal or federally assisted projects in the same immediate area.

OFCCP is without jurisdiction to regulate private projects also because the Executive Order does not itself recognize such jurisdiction. The Executive Order has several separate parts. Part II defines the obligations of direct federal contractors. Part III defines the obligations of those working on federally assisted construction projects. Part II states that the Executive Order shall apply to all facilities. Part III contains no similar statement.

Although Part II literally applies to direct federal construction projects, Part III should be interpreted to apply to such projects. Direct federal construction has far more in common with federally assisted construction than with service or supply. (OFCCP has always taken a singular approach to all construction, and has never applied Revised Order No. 4 to any construction project.)

In any event, for at least two additional reasons, the agency's 7q requirement is unlawful. OFCCP did not identify evidence of discrimination throughout the construction industry before imposing the 7q requirement. Nor did the agency first provide an opportunity for meaningful comment.

The Fifth Amendment permits the imposition of sex or race conscious goals only to the extent that such action is necessary to remedy past discrimination. 14/ Title VII similarly but independently circumscribes the authority of OFCCP. 15/ Title VII permits the agency to require prefer-

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14/ See Fullilove v. Klutznick, __U.S.__, 65 L.Ed.2d 902 (1980).

15/ See United States v. Trucking Management Inc., note 10, supra; United States v. East Texas Motor Freight System, note 7, supra.

ential treatment of women or minorities only after the agency has made a specific finding of unlawful discrimination. 16/ OFCCP has evidently made the requisite finding as to those areas with utilization goals prior to October of 1980, areas covered in the past by Hometown Plans, Imposed Plans, or Special Bid Conditions. 17/ However, the agency has not made the requisite finding as to the many other areas reached by its 7q requirement.

OFCCP based its current nationwide program on the assumption that the entire construction industry is discriminatory. The agency assumed that discrimination exists in in all areas simply because the agency, or a court, had found discrimination in some areas. The agency similarly assumed that discrimination exists in all construction crafts simply because the agency, or a court, had found discrimination, for example, among ironworkers. City-by-city and craft-by-craft analysis may be too slow, too time consuming, to suit OFCCP, but the Fifth Amendment, if not Title VII, requires facts and detailed analysis. 18/

The APA requires federal agencies to "give interested parties an opportunity to participate" in the development of new regulations. 19/ Nevertheless, when OFCCP proposed the 7q requirement, it defied reality, and asserted that it was merely "clarifying" existing obligations. The agency thereby discouraged interested parties from commenting, and precluded proper consideration of comments based on the reality that OFCCP was breaking with its past. The agency unlawfully minimized discussion of fundamental issues, such as the agency's jurisdiction over private projects.

16/ 42 U.S.C. § 2000e2(j) (1976).

17/ See e.g. Contractor's Ass'n of Eastern Pennsylvania v. Secretary of Labor, note 2, supra.

18/ See Central Alabama Paving, Inc. v. James, 499 F. Supp. 629 (M.D. Ala. 1980); Perini Corp. v. Massachusetts Bay Transportation Authority, No. 77, 2340-MC (D.C. Mass. Sept. 22, 1980).

19/ 5 U.S.C. § 553 (1976).

Finally, OFCCP's exercise of jurisdiction over private projects will not, in the end, increase the number of women and minorities who are on those projects. The construction industry is very large, but also very fragmented. (The industry has no "big three."). As a result, the industry remains intensely competitive, and the cost of satisfying OFCCP will at least eventually drive federal and federally assisted construction contractors out of the market for private projects. Wholly private construction contractors, unburdened by OFCCP's maze of regulations, will consistently submit the lowest bids on private projects.

Even if OFCCP's exercise of such broad jurisdiction were to yield significant benefits, the cost of the agency's overreaching would be grossly disproportionate. Coverage of all private projects increases geometrically the already great cost of satisfying paperwork and other Executive Order obligations.

The confusion created by OFCCP's overreaching is similarly disproportionate. A contractor may well begin a federal or federally assisted project while in the middle of several private projects. Are the contractor's affirmative action obligations retroactive? If so, to what extent? Conversely, a contractor may begin several private projects while in the middle of a federal or federally assisted project. Do a contractor's affirmative action obligations end when the contractor completes the federal or federally assisted project? Or do they continue indefinitely, leapfrogging from one private project to another? OFCCP has taken the position that affirmative action obligations are specifically enforceable even after termination of the federal contract.

The "bicycling" theory, on which OFCCP has occasionally relied, is not well-founded. Construction contractors cannot, as a rule, enjoy the luxury of an exclusively "federal" labor force. In any event, even if valid, the theory would not justify OFCCP's exercise of jurisdiction over private projects distant from any federal or federally assisted projects.

III. Female and Minority Utilization Goals for the Construction Industry

OFCCP does not have the authority to impose utilization goals. Even if it did, the agency's current goals could not withstand close scrunity. OFCCP imposed its current goals in disregard of the APA and the agency's own regulations.

The Federal Procurement Act is a rather simple, general "housekeeping" statute, one designed only to standardize and economize the federal procurement effort. Whatever it otherwise authorizes, the statute does not authorize the imposition of sex and race conscious goals. Such goals are always suspect. They are constitutional, and consistent with Title VII, only when imposed as a remedy for past discrimination. 20/ Had Congress intended to authorize the Executive Branch to impose such goals, Congress would have so stated. The courts have explained:

> A congressional grant of legislative authority need not be specific in order to sustain the validity of regulations promulgated pursuant to the grant, but a court must "reasonably be able to conclude that the grant of authority contemplates the regulations issued." 21/

Nor does the Executive Order itself purport to authorize sex and race conscious goals. To the contrary, the Executive Order mandates that federal contractors treat their employees "without regard to their race, color, religion, sex, or national origin." The Executive Order prohibits discrimination. It does not institutionalize preferential treatment for women and minorities.

OFCCP's own interpretation of its authority is entitled to little deference. Congress passed the Federal Procurement Act in 1949, and President Kennedy mandated "affirmative action," by federal contractors, in 1961. Nevertheless, OFCCP did not claim the authority to declare utilization goals until 1968. 22/

Whatever its authority, OFCCP's preoccupation with numerical goals has not served women and minorities well. The agency has repeatedly claimed that it can best effect affirmative action by declaring numerical goals, but has never substantiated this claim. The agency has never shown that numerical goals are more effective, for example, than education and training. In fact, for over a decade, the agency has not even seriously considered alternatives to numerical goals. The available evidence suggests that numerical goals are not effective: "A variety of economic studies has revealed that the gap between average incomes

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20/ *See* text accompnaying notes 14-16, *supra*.

21/ *Liberty Mutual Insurance Co.* v. *Friedman*, note 5, *supra*, at 169, *quoting Chrysler Corp.* v. *Brown*, 441 U.S. 281, 308 (1979).

22/ *See* 33 Fed. Reg. 7804, 7811 (1968).

for black and white workers is the smallest in those industries that are least likely to include federal contractors...." 23/

OFCCP's numerical goals also have several negative side-effects. They put pressure on construction contractors to employ marginally qualified and inexperienced women and minorities. Such workers can easily injure both themselves and others. Building a bridge, or other large structure, is inherently dangerous. In addition, OFCCP's numerical goals undermine fundamental American values. Such goals foment resentment, and personal animosity, polarizing the members of the opposite sexes, and of different racial and ethnic groups. Finally, the goals tend to devalue individual accomplishment.

AGC opposes OFCCP's current utilization goals both on the grounds cited above, and on several additional grounds. OFCCP disregarded the APA when it extended its female goal beyond March 31, 1981. The agency disregarded its own regulations when it developed its current goals. 24/

A. Female Utilization Goal

OFCCP's female utilization goal is 6.9 percent. Federal and federally assisted construction contractors with contracts in excess of $10,000 must fill 6.9 percent of the total hours of training and employment, in each craft, on each construction site, with women.

Although the APA requires federal agencies to publish a general notice in the Federal Register, and to provide at least 30 days for public comment, before imposing a new obligation, 25/ OFCCP took neither step before extending its female goal.

23/ Rabkin, "The Stroke of a Pen," Regulation, 17 (May/June 1981).

24/ See 41 C.F.R. § 60-4.6 (1980).

25/ See 5 U.S.C. § 553 (1976).

Section 60-4.6 of the current regulations states that "goals... shall be based on appropriate workforce, demographic or other relevant data...." 26/ Nevertheless, OFCCP based its female goal on nationwide and otherwise inappropriate data. Moreoever, the agency based its goal, at least in part, on its entirely irrelevant desire to settle ongoing litigation.

OFCCP based its goal on nationwide data on the highly simplistic theory that women are evenly distributed throughout the country. In the process, the agency overlooked the obvious fact that the general population is not the available labor force. Even if women are evenly distributed throughout the nation, the factors which determine female availability are not so distributed. The schooling of women, as well as men, varies from region to region, and indeed within each region. Possibly relevant work experiences also vary geographically. How readily women can transfer from nonconstruction to construction jobs depends on a variety of factors, including the nature of the requisite skills, and the age of the women involved. These subsidiary factors vary, in turn, among and within different regions of the country. The female participation rate depends in part on the social acceptability of such participation. Acceptability, for better or worse, varies from region to region. The cultural milieu of many rural areas remains very different from the milieu of major urban areas. The female participation rate also depends upon the general demand for labor, and general economic circumstances. These factors also vary geographically, as do the costs of commuting, and the availability of public transportaiton. Nationwide data is not an appropriate basis for female utilization goals.

OFCCP relied, more directly, on its estimates that women accounted for 1.2 percent of the craftsmen and "kindred" workers in the construction industry, and 5 percent of such workers in all industries. 27/ These estimates reflect, in turn, otherwise inappropriate data.

According to AGC's independent research, women accounted for only 0.5 percent of all construction workers onsite in 1978. The data underlying the agency's estimate of female utilization evidently encompassed many women not directly involved in onsite construction. As a result, the data could not form an appropriate basis for strictly onsite utilization goals.

26/ 41 C.F.R. § 60-4.6 (1980) (emphasis added).

27/ 43 Fed. Reg. 14899 (1975).

The agency intended its estimate of the percentage of women among all craft and "kindred" workers to be, in effect, an estimate of potential availabiltiy. 28/ However, "potential availability is not a concept that standardized data sources such as the Census have attempted to measure." 29/ Even if OFCCP's interest in potential availability were otherwise justified, OFCCP's estimate of potential availability would not merit deference.

OFCCP's interest in potential availability is not otherwise justified because an appropriate data base, for its estimation, simply does not exist. Estimating potential availability is not simply a process of identifying "comparable" or "kindred" occupations. A contractor's ability to utilize a pool of potentially available workers "is a function of the goal to be reached, such as parity, the time horizon over which the goal is to be reached, the number of job openings in the job class of interest, and the costs and effectiveness of [enhancement] efforts." 30/ Any estimation of potential availability, from presently available data, would be subject to serious question.

However construed, OFCCP's data cannot justify a female utilization goal of 6.9 percent. Relying on the 1970 Census, OFCCP estimated that women constituted 5 percent of all craft and "kindred" workers. 31/ Even if this were an accurate, defensible estimate of potential availability, this estimate would not justify a female utilization goal well in excess of 5 percent.

The available evidence suggests that OFCCP does not have any data which would justify its current goal. When it first declared the goal, OFCCP explained only that "affirmative action...would raise the goal to 6.9 percent...." 32/ When the agency published its ANPR, on July 14, 1981, the agency similarly failed to cite any data which would support a goal of 6.9 percent. 33/ The former Director of OFCCP, Mr. Weldon J. Rougeau, when asked whether federal construction

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28/ See id.

29/ Abt Associates, Inc., Restructuring Availability Analysis for Affirmative Action Planning, 8-9 (1981) (Abt Report).

30/ Id. at xiv.

31/ 43 Fed. Reg. 14899 (1978).

32/ Id.

33/ See 46 Fed. Reg. 36213, 36215 (1981).

contractors could meet the 6.9 percent goal, answered that "overall, no, not to meet all of our nationwide goals in every craft throughout the nation. We have known this for a long time." 34/

At the same time, Mr. Rougeau admitted that the 6.9 percent goal was "really a figure....reached in trying to settle the litigation that had been filed against [OFCCP] by several womens organizations." 35/ (This particular admission went well beyond the former Director's separate admission that "the goals in the construction program ...are not necessarily based on hard data...." 36/) Reading the former Director's statement as charitably as possible, AGC still cannot avoid the conclusion that OFCCP based the goal, at least in part, on its entirely irrelevant desire to settle ongoing litigation.

OFCCP's failure to develop and rely on appropriate data has had predictable consequences. The agency has established a goal bearing little or no relationship to the true availability of qualified female construction workers. Construction contractors have been unable to meet the established goal. The contractors could not meet the goal, for several years, even if all apprentice slots were reserved exclusively for women.

At least until OFCCP satisfies the Administrative Procedure Act, and identifies appropriate data to justify its female utilization goal, the agency will remain without the legal authority to enforce that goal.

B. Minority Utilization Goals

OFCCP has declared a minority utilization goal for each Standard Metropolitan Statistical Area (SMSA), as defined by the Office of Management and Budget, and also for each Economic Area (EA), as defined by the Commerce Department. Federal and federally assisted construction contractors with contracts in excess of $10,000 must satisfy the goal for the SMSA, or EA, in which they are working. The goal applies to the total hours of training and employment, in each craft, on each construction site.

34/ Hearings on the Departments of Labor, Health, Education and Welfare, and Related Agencies' Appropriations For 1981, Before A Subcommittee of the House Committee on Appropriations, 96th Cong., 2d Sess. 80 (1980).

35/ Id., at 79.

36/ Id., at 80.

Because OFCCP neglected, at the outset, to base its minority utilization goals on appropriate data, AGC opposes enforcement of the goals.

As already explained, § 60-4.6 of the relevant regulations states that "goals... shall be based on appropriate workforce, demographic or other relevant data...." 37/ Nevertheless, OFCCP based its minority goals on Census data aggregated by SMSA, or EA. The agency simply blinked at the reality that SMSAs, and EAs, are not the same as the labor markets which, in the real world, determine availability. SMSAs and EAs reflect, at best, average commuting patterns. These geographic units do not reflect the commuting patterns to particular construction sites. "[C]ommuting patterns to any particular firm may be vastly different from the average commuting patterns determined from Census or other data." 38/

Whether SMSAs and EAs reflect even average commuting patterns is highly questionable. Experts have determined that "commuting fields on average extend to about 25 or 30 miles from the place of work." 39/ In other words, "most commuters travel less than this distance." 40/ The length of an SMSA, or EA, may well exceed 30 miles. The Chicago SMSA includes counties 100 miles from the center city. One EA includes noncontiguous counties in Delaware, New Jersey and central Pennsylvania.

Data aggregated by EA is inappropriate also because EAs do not reflect the dramatic changes in transportation costs which have occurred since 1960. EAs are based on 1960 Census data. (This data was otherwise so defective that Commerce Department had to supplement it with informal surveys of commuting patterns.)

OFCCP similarly relied on data aggregated across all construction trades, on the erroneous assumption that availability does not vary from trade to trade. 41/ Different crafts require different skills. Requisite skills are among the most basic determinants of availability.

37/ See note 26, supra.

38/ ABT Report, note 29, supra, at 27.

39/ Id., at 24.

40/ Id.

41/ See 45 Fed. Reg. 65975, 65983 (1980).

OFCCP based its minority goals directly on its estimates of the experienced civilian labor force in the various areas. "The numerical goal itself [is] the minority percentage in the experienced civilian labor force of the SMSA or EA." 42/ The obvious problem is that the many factors which determine availability are not spread evenly throughout the experienced civilian labor force. The percentage of minorities among all qualified construction workers does not equal the percentage of minorities among all workers of all kinds.

OFCCP has not even suggested a theory which would justify its reliance on data aggregated by SMSA, or EA. The agency has, instead, raised the flag of political expediency: "SMSAs and EAs are the geographical units which possess the most positive characteristics and the smallest number of negative characteristics." 43/

At least until OFCCP identifies appropriate data to justify its minority utilization goals, the agency will also remain without the legal authority to enforce those goals.

IV. Conclusion

OFCCP's back pay policy is unlawful and unnecessary. The agency's exercise of jurisdiction over private construction projects, and its imposition of utilization goals, are similarly unlawful. The latter are also inconsistent with legitimate public concerns. AGC urges OFCCP to confront these problems, and to recognize the larger reality that a program designed primiarily to intimidate, even if initially necessary, to break the hold of certain fundamental attitudes, becomes dangerously counterproductive if left in place for too long.

Without encouraging "reverse" discrimination, or creating the other problems described above, OFCCP can ensure that women and minorities are the primary beneficiaries of future growth in the aggregate demand for qualified construction labor. The agency can emphasize and encourage the education and training of women and minorities, vesting these groups with the skills necessary to make them competitive in the marketplace. AGC is a leader in the field of education and training, promoting programs which permit trainees to enter the labor market as fast as the trainees' natural abilities will allow. AGC would gladly lend its expertise to OFCCP.

42/ 45 Fed. Reg. at 65982

43/ Id.

Once again, AGC urges OFCCP to continue pursuit of equality of employment opportunity. AGC is fully prepared to work closely with OFCCP, and others, to achieve this objective of mutual interest to all.

Sincerely,

HUBERT BEATTY
Executive Vice President

cc: Hon. Raymond J. Donovan
Timothy Ryan
Ellen M. Shong

HB:jf

Senator **Williams**. We will go on. Mr. Bridge from the Associated Builders and Contractors is next.

STATEMENT OF JOHN BRIDGE, PRESIDENT, BRIDGE CONSTRUCTION CORP., AUGUSTA, MAINE, ACCOMPANIED BY COLETTE NELSON, ASSOCIATED BUILDERS AND CONTRACTORS

Mr. **Bridge**. Thank you, Senator. I am John Bridge, president of the Bridge Construction Corp. of Augusta, Maine, a small heavy and highway contractor employing 200 people with an annual volume of approximately $15 million. I am wearing a lobster tie, just so you can identify the State from which I come by the Maine lobster.

Senator **Williams**. We have the demand, you have the supply, but the price is not right. What has happened to the price of lobsters? It is out of sight.

Mr. **Bridge**. Well, it has actually been fairly good this summer. I have a friend who is a lobsterman, so I do not have to worry about the price. He brings me a few when he comes up to Augusta. We are only 30 miles from the coast. [Laughter.]

We are proud members of, and I am testifying on behalf of Associated Builders and Contractors, a national construction industry trade association representing more than 16,000 firms nationwide. The members of ABC believe in the "merit shop" philosophy of awarding construction contracts to the lowest responsible bidder. Today more than 60 percent of all construction in this country is done the "merit shop"—open shop—way.

A recent survey showed that 45 percent of our members do work for the Federal Government. Thus, they become subject to the rules and regulations of the Office of Federal Contract Compliance programs.

ABC wants to make clear from the beginning that we support the principles embodied in our equal opportunity laws. In addition, ABC supports the recruitment and training of minorities and women because of the criticial shortage of skilled labor in the construction trades, estimated by some people in the next 10 years to be a 2 million worker deficiency.

However, ABC has become increasingly concerned with the failure of OFCCP to fulfill its commitment. As a result, OFCCP has become a prime target for the frustration and anger of the business community in general and the construction industry in particular.

ABC believes that the basic elements of affirmative action are recruitment, training, and hiring. None of these elements can stand alone. OFCCP, however, has focused almost entirely on the third element, hiring, to the detriment of the affirmative action program.

ABC urges Congress and the Department of Labor to take this opportunity to develop and implement a proper regulatory strategy encompassing all three elements of affirmative action, especially training.

Mr. Chairman, I would like to ask that ABC's written statement be made part of the record of this hearing.

Senator **Williams**. It will be.

Mr. **Bridge**. As for personal experience, I can say that in our geographic area, time and again, Maine, New Hampshire, and

Vermont have been required to comply with the regional hiring goals based on Massachusetts' population and ethnic mix. On numerous past occasions, our company has been instructed—let me substitute—ordered to import minorities from out-of-State—as far away as California was one suggestion—in order to meet the regional goals of 10 percent or more ethnic minority labor force established in Boston, Mass. These orders have been made with a full knowledge of northern New England's total minority population of about six-tenths of 1 percent.

We viewed such capricious interpretation of Executive Order No. 11246 as an attempt by some overzealous bureaucrats to restructure in their mold the socioeconomic balance of our States. We quickly learned that capricious was OK when OFCCP was on your side.

In 1978 our company was nearly strangled by one EEO official of the EPA who was fully supported by an official friend at OFCCP. Because we refused after the bid opening to sign a preaward quota of 10 percent minority participation in the labor force, this one regional official blocked the award of three contracts totaling $5 million, which is approximately one-third of our annual volume.

We spent several agonizing months and nearly $12,000 in legal fees defending our right to do business. While these three projects were delayed, our 103-year-old reputation was slandered and the Government officials involved tried to enlist the aid of some Maine minorities to perjure our actions. That covert ploy backfired. Third-party outside pressures of the grantees involved finally brought the matter to a close.

However, the laws still allow such abuse of Congress' intent and need to be modified accordingly. This experience is only one of many in Maine and countless such horror stories that occur nationally, squandering taxpayers' dollars and debilitating the spirit of the business community.

It is well worth noting that legal fees and mental anguish are not the only negatives when projects such as these are unnecessarily delayed. I can think of at least three others: Disruption of planning, scheduling, especially by the contractor, who is out on a limb; inflation at work on the contractor's costs during the delay; and, three, the Government's own people's time and expense. All these costs are eventually paid by the remote taxpayer who relies on Congress as his watchdog.

Another excess that contractors see firsthand is paperwork. This has been mentioned by many witnesses before me. We at the Bridge Construction Corp. lost our EEO person abruptly in May of this year, right at the start of our season. By July 1, when a replacement came on board, our EEO program was in disarray.

Cathy Dunford, our new EEO officer, and a temporary helper, spent 2 months simply getting the paperwork in order. Last month an OFCCP audit was held and we passed with flying colors. Our paperwork was in order. However, I might add that I was not totally pleased with our own program in the temporary absence of an EEO officer but it shows that the paperwork is what the review/audit people from OFCCP are more than properly concerned with.

As the order now decrees, it is necessary only to hire a sufficient number of bodies and to keep adequate paperwork to satisfy the audit. Frankly, that is all the OFCCP really cares about, and that is a tragic misapplication of the spirit and potential of 11246. What does an otherwise unemployable have to show for a summer's labor but a few dollars? Consider his personal achievement, society's gain, and the Government's real contribution when the same person is not just hired but also entered into and graduated from a bona fide training program, then retained as a valuable asset to the construction industry.

ABC commends the Reagan administration for taking an important step toward regulatory reform in its proposal of August 25 but the changes proposed are de minimis and will not cure the current problems and unnecessary costs associated with OFCCP's affirmative action program.

ABC urges Congress and OFCCP to fully consider ABC's recommendations and comments and meet the pressing need for sufficient reform in the area of affirmative action. We offer our services and our resources to the development and implementation of an affirmative action strategy encompassing recruitment, training, and hiring of minorities and women. ABC truly believes that such a strategy will create significant opportunities for women and minorities in the construction industry, and fulfill the mandates of Executive Order No. 11246.

Thank you.

[The prepared statement of Mr. Bridge follows:]

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STATEMENT OF
ASSOCIATED BUILDERS AND CONTRACTORS

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

CONCERNING

AFFIRMATIVE ACTION

OCTOBER 22, 1981

John Bridge
President
Bridge Construction Corporation
319 Water Street
P.O. Box 229
Augusta, Maine 04330

Merit Shop Builds Best

Statement of
Associated Builders and Contractors

Associated Builders and Contractors (ABC) is a national construction industry trade association representing more than 16,000 firms nationwide. The members of ABC believe in the "merit shop" philosophy of awarding construction contracts to the lowest responsible bidder. Today, more than 60 percent of all construction in this country is done the merit (open) shop way.

A recent survey of ABC members by the Opinion Research Corporation showed that 45 percent of those members do work for the federal government. They, thus, become subject to the rules and regulations of the Office of Federal Contract Compliance Programs (OFCCP).

OFCCP administers the enforcement of Executive Order 11246, which prohibits employment discrimination by government contractors based on race, color, sex, religion, or national origin and mandates affirmative action in employment. OFCCP also enforces section 503 of the Rehabilitation Act of 1973 and section 402 of the Vietnam Era Veterans Readjustment Act which require federal contractors to employ and advance in employment handicapped, disabled veterans and Vietnam-era veterans.

ABC wants to make clear from the beginning that we support the principles embodied in our equal employment opportunity laws. We believe that discriminatory practices which deny individuals the opportunity of learning skills or working in the construction industry are legally, economically, and morally harmful to our nation and our industry.

In addition, ABC supports the recruitment and training of minorities and women because of the critical shortage of skilled labor in the construction trades. The United States currently produces only 50,000 skilled construction workers a year, less than 25 percent of the number needed. The problem may become more serious as the U.S. Bureau of Labor statistics projects a possible shortage of 1.9 million skilled construction workers by 1990.

Thus, ABC has become increasingly concerned with the failure of OFCCP to fulfill its commitment. OFCCP seems to have lost sight of the basic mission of the program - to promote the recruitment, training and hiring of minorities and women. Instead, it has polarized parties on affirmative action issues by instituting an adversarial, and sometimes arbitrary, approach to enforcement of its rules and regulations. As a result, OFCCP has become a prime target for the frustration and anger of the business community in general and the construction industry in particular.

ABC believes that the basic elements of affirmative action are recruitment, training, and hiring. None of these elements can stand alone. OFCCP, however, has focused almost entirely on the third element, hiring, to the detriment of the affirmative action program.

The general perception that OFCCP pays little attention to legitimate business concerns has lead ABC to the belief that it is time to reexamine the fundamental concepts which underlie the government's present approach to affirmative action. ABC urges Congress and the Department of Labor (DOL) to take this opportunity to develop and implement a proper regulatory strategy emcompassing all three elements of affirmative action.

OFCCP's Policies Conflict with other Agencies

Each year approximately 45 percent of ABC's members acquire federal or federally-assisted construction projects. They thereby become directly subject to the rigorous rules and regulations of the OFCCP, the Bureau of Apprenticeship and Training (BAT), and the Wage and Hour (the Davis-Bacon Act requirements) Division of DOL. No federal agencies have greater impact on the construction contractor's hiring and employment practices than these three. Yet these agencies have implemented regulations and policies which work at cross-purposes to each other and obstruct affirmative action for women and minorities.

Construction employment averaged about 4.5 million during 1980. In the same year, minorities accounted for 9.18 percent and females accounted for 1.57 percent of the blue-collar construction labor force. (See Table A.) There are not now sufficient numbers of minorities and women in the construction labor force to meet the goals imposed by OFCCP. The program has thus created a need to bring unprecedented numbers of untrained individuals on to construction job-sites in an extemely short period of time and the need to train such individuals commensurate with the productivity and safety factors so vital to construction competition. But an examination of the current system of training for entry into the construction crafts clearly reveals that it is incapable of meeting these needs.

Pursuant to the Davis-Bacon Act and DOL's implementing regulations (29 C.F.R. Part 1), no federally-involved construction contractor is permitted to pay a worker less than the prevailing journeyman wage rate unless the individual is in a training program registered in conformity, with BAT regulations. As a result of these regulations, the only realistic source of workers-in-training on federal and federally-assisted construction projects is through apprenticeship programs approved by BAT.

In 1979, women accounted for 2.56 percent (4,323) of the 168,590 apprentices in the registered building and construction trades programs for 15 different trades. (See Table B.) It takes an average of 3 1/2 years for an entering apprentice to graduate to journeyman.

Local apprenticeship programs, under the current BAT requirements (29 C.F.R. Part 30), are obligated to enroll females at one-half the percentage which women comprise the total work force in each Standard Metropolitan Statistical Area (SMSA). Assuming women average 50 percent of the work force, then 25 percent, or one of every four new apprentices, must be female. This means that for compliance under the apprenticeship regulations, 17,000 females need to be placed in a first year apprenticeship class of 68,000.

With 310,500 women needed to meet the overall goals but only 17,000 needed for the apprenticeship goals, the construction industry obviously faces a problem. Even if local apprenticeship committees doubled their intake of women (in excess of the requirements of 29 C.F.R. Part 30), the goals for females imposed by OFCCP cannot be met. In fact, the construction industry could not meet OFCCP goals for women through existing apprenticeship even if all new apprenticeship slots were reserved exclusively for women.

And this, of course, would not resolve the problem of meeting OFCCP goals for minorities!

Table A
Minority and female construction workers as a percent of blue-collar occupational groups
1979-1980

	Black and other		Female	
	1979	1980	1979	1980
Craft and kindred workers	6.92	7.25	1.03	1.27
Operatives, except transportation	8.48	7.59	1.65	2.09
Transportation equipment operatives	14.76	15.35	1.42	1.55
Nonfarm laborers	17.90	16.34	2.38	2.62

SOURCE: BLS, Employment and Earnings, January 1981 and January 1980, Tables 27-28.

Table B
Apprentices in Registered Building Trades Programs
as of June 1979

Trade	Total apprentices	Female apprentices	Percent female apprentices
Asbestos Workers	1,174	23	2.0
Boilermakers	4,083	47	1.2
Bricklayers	8,462	120	1.4
Carpenters	43,332	1,429	3.3
Cement Masons	3,118	138	4.4
Electricians	34,584	814	2.4
Glaziers	1,160	8	0.7
Iron Workers	8,296	103	1.2
Lathers	1,483	16	1.1
Operating Engineers	6,051	419	6.9
Painters	6,760	425	6.3
Pipe Fitters, Steam Fitters & Sprinkler Fitters	15,634	345	2.2
Plumbers	17,554	176	1.0
Roofers	5,745	57	1.0
Sheet Metal Workers	11,154	203	1.8

SOURCE: U.S. Department of Labor, Annual Construction Industry Report, April 1981, page 5.

It is obvious in view of the substantial requirements OFCCP has imposed on the construction industry, DOL must support the development of innovative and untraditional programs for the recruiting and training of minorities and women. ABC urges DOL to develop and implement a program to identify potentially qualified applicants in connection with the affirmative action obligations of government contractors and subcontractors. One such program is discussed infra.

In addition, ABC recommends that DOL expand the difinition of "apprentice" contained in the Davis-Bacon regulations (29 C.F.R. 5.2(n)(1)) to include those individuals who are registered in a state, local, or other federal agency-approved training program. It is apparent that DOL's long-standing policy of allowing only BAT-approved programs has the effect of preventing unregistered, entry-level minority and female persons from entering the construction industry.

Finally, ABC recommends that DOL promote the development of innovative training programs in the construction industry. One such program is "Wheels of Learning", a competency-based, task-oriented training program in 21 construction trades. "Wheels of Learning" is being developed by ABC to provide the construction industry with a comprehensive craft training program, which will teach usable skills in a timely manner, in a convenient location, and at a relatively low cost. (See Appendix A for a more in-depth discussion of ABC's "Wheels of Learning" Program.) ABC looks forward to working with DOL to assist them in developing and implementing such a program.

Coverage Thresholds for the Construction Industry (Section 60-4.2)

The current OFCCP regulations subject all federal and federally-assisted construction contractors who have contracts which meet the basic coverage threshold (a contract in excess of $10,000) to the requirements in Part 60-4 including specific minority and female utilization goals and sixteen affirmative action steps.

In OFCCP's proposed regulations of August 25, 1981, OFCCP contemplates the establishment of a two-tiered threshold system which would provide that contractors with federal or federally-assisted construction contracts in excess of $10,000 be contractually subject only to a commitment not to discriminate and to take affirmative action. These contractors would not be subject to specific goals and timetables and would not be required to take the specified affirmative action steps.

The second tier would apply to contractors with a federal or federally-assisted construction contract of $50,000 or more and which, for six consecutive months during the twelve months immediately preceding the contract award, the contractor employed craft workers for a total of 20,000 or more hours. OFCCP estimates that this work requirement reflects 20 full-time workers employed over a six-month period.

The threshold levels proposed by OFCCP are too low to effectively reduce the compliance burden on small contractors, and would exempt a de minimis number of construction projects from the nine step requirement.

ABC recommends that, if a tiered system is implemented, the threhsold levels be expanded to three levels, with additional compliance responsibility as the size of business and the contract amount increase:

Level I

<$500,000 total annual volume of business (over three years)

AND

<$100,000 in federal contract.

If both of these are met, contractor must:

- Sign an affirmative action clause

Level II

$500,000 - $5 million total annual volume of business (over three years)

AND

$100,000 - $1 million in federal contract.

If both of these are met, contractor must:

- Sign affirmative action clause
- Make "good faith" effort to meet goals
- File EEO-1 report
- If goals are not met, file narrative report

Level III

>$5 million total annual volume of business (over three years)

AND

>$1 million in Federal contract

If both of these are met, contractor must:

- Sign affirmative action clause
- Make "good faith" effort to meet goals
- File Form 257 utilization report quarterly
- Follow nine steps

This approach would be in keeping with the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) by appropriately placing the compliance burden on larger companies which can more effectively and efficiently comply with the regulatory burden. Pursuant to the Regulatory Flexibility Act of 1980 (RFA), DOL must consider regulatory alternatives, consistent with the stated objectives of applicable statutes, which provide for "differing compliance or reporting requirements or timetables" that take into account the resources of small businesses (5 U.S.C. 603(c)(1)). The term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration (SBA) and after opportunity for public comment, establishes definitions of such term (5 U.S.C. 601 (3)). Reading these two sections of the RFA together, it would be most appropriate and warranted for DOL to adopt ABC's recommended thresholds since they are consistent with SBA's definition of "small business concern" and in accordance with the provisions of the RFA.

Unvalidated Goals (Section 60-4.6)

OFCCP does not require construction contractors to set goals and timetables or develop their own written affirmative action plans. Instead, OFCCP mandates utilization (or employment) goals for construction contractors. With its April 1978 regulations, OFCCP published various minority goals for different geographic areas and a nationwide goal for females. On November 3, 1980, OFCCP revised its minority hiring goals. The new goals are based upon minority workforce presence in SMSA's and Economic Areas (EA). A single minority goal covers all crafts in an SMSA or EA, and each SMSA and EA has a separate goal. The nationwide goal for women is currently 6.9 percent.

ABC submits that neither the minority nor the female goals are attainable under the conditions imposed on the construction industry by the federal government (as discussed supra). ABC further submits that OFCCP is and has long been aware of the discrepancy between its goals and reality.

OFCCP's goals for the construction industry were promulgated in response to pressures on DOL by a series of law suits filed against DOL by women's groups in 1976. In testimony before the House Labor-HEW Appropriations Subcommittee on February 5, 1980, OFCCP Director Weldon Rougeau stated,". . . the goals in the construction progam are goals which we admit are not necessarily based on hard data which has been obtained by the Department or any other groups." At the same hearing, in response to a question about whether women trained in construction crafts are available in sufficient numbers, Director Rougeau stated, "Overall, no, not to meet all of our nationwide goals in every craft throughout the nation. We have known this for a long time." In testimony before the same subcommittee on February 4, 1980, Secretary of Labor Ray Marshall stated that there is "no scientific way to set goals."

The goals promulgated by OFCCP for the construction industry have no statistical basis and were arbitrarily established. The goals fail to take into consideration the variety of skills and different levels of training required for the various trades in the construction industry. OFCCP's regulations provide that all affected contractors in a SMSA must meet the same hiring goals. Subcontractors and specialty contractors engaged in the hard-to-learn trades, those with long apprenticeship periods such as electrical and plumbing which have the greatest difficulty attracting minority and female trainees, realistically cannot meet the same hiring goals as other building craft employers.

If OFCCP mandates the use of goals, instead of setting across-the-board goals, OFCCP should set minority and female goals for each trade based on the availability of trained minorities and owmen in each SMSA or EA. OFCCP has set criteria for determining and implementing goals for service and supply industries (60-2.11). These criteria include:

- The size of the minority/female unemployment force in the labor area surrounding the facility;
- The percentage of the minority/female work force as compared with the total work force in the immediate labor area;
- The general availability of minorities/females having requisite skills in the immediate labor area;
- The availability of minorities/females having requisite skills in the area in which the contractor can reasonably recruit;
- The existence of training institutions capable of training persons in the requisite skills;
- The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities/women.

While it would be difficult, if not impossible, for each contractor to set goals and time tables for each project, OFCCP should use these same criteria for establishing and implementing goals in the construction industry.

OFCCP's regulations for service and supply industries also provide that:

> ". . . an establishment shall be presumed to have reasonably utilized minorities and women, and shall not be required to explain if minorities and women are being underutilized or to establish goals and timetables, for job groups in which the employment of minorities and women is at least 80% of their availability" (60-2.11). (Emphasis added).

ABC urges OFCCP to apply this provision to the construction industry.

OFCCP regulations also provide that minority hiring goals will be updated dicenially. Contractors and subcontractors in SMSAs that experience large gains in their minority population over the ten-year period since the previous Census Report will be compelled to meet a sharply higher updated hiring goal, causing a significant displacement in the local construction workforce. OFCCP regulations should be amended to phase-in these updated minority hiring goals.

OFCCP regulations provide that when 1980 census data becomes available, affected contractors and subcontractors must provide for "appropriate participation rates for minority subgroups" such as Blacks, Hispanics, Orientals, Eskimos, and Aleuts by setting a separate hiring goal for each. Paperwork requirements, of course, will increase commensurately. Separate hiring goals for racial and ethnic subgroups would unnecessarily increase the regulatory burdens of contractors, and thus, should not be implemented.

Use of Quotas

OFCCP has taken the position that its minority and female utilization goals are only a standard by which to measure a federal contractor's "good faith" affirmative action effort. In reality, these "goals" are enforced as quotas.

According to current OFCCP procedures, a contractor who has not met his "goals," but has complied with the 16 affirmative action steps should be found in compliance. Such compliance requires sufficient documentation of contractor efforts under the 16 steps. Unfortunately, OFCCP standard operating procedures provide no definition concerning sufficient documentation of the 16 steps. If a contractor is not meeting his goals, OFCCP assumes that he cannot possibly be doing enough paperwork and documentation to be in compliance. Thus, Federal contractors are reviewed with the absolute expectation that OFCCP "goals" are met.

The nine steps in section 60-4.3 of the proposed regulations contain still another example of OFCCP's use of "quotas." In step "a," OFCCP proposes to require each contractor to "assign two or more women to each construction project." The use of a specific number is surely a quota.

Contractors who fail to meet their "goals" are usually required to sign a conciliation agreement. Such agreements cite the contractor's failure to meet a "goal" as a "deficiency." OFCCP even labels the "goals" in its conciliation agreements as "required goals."

ABC believes OFCCP should take action immediately to end the use of quotas in its affirmative action program. At a minimum OFCCP should amend its regulations to clearly state that a contractor's failure to meet the "goals" alone should not constitute a basis for any administrative action. Further, OFCCP staff should constantly be reminded of this policy.

The Affirmative Action Steps (Section 60-4.3)

In April 1978, OFCCP published revised affirmative action regulations for federal construction contractors. Instead of requiring construction contractors to adopt a written affirmative action plan, federal contract specifications were amended to include 16 steps. These steps include keeping lengthy lists of minority and women's groups, subcontractors, and suppliers; constant notification and recordkeeping on each new project or business development; and an extraordinary amount of documentation, including letters, memoranda, telephone logs, and more to prove compliance. All contracts over $10,000 include a listing of over 40 individual operations that must be taken and documented, at a minimum, to show "good faith" effort to meet minority and female utilization goals. For example, a contractor must:

1. Maintain documentation of good faith efforts to employ one woman for every 20 skilled trades persons;
2. Maintain documentation that all foremen maintain a working environment free of harassment;
3. Maintain a current listing of recruitment sources for minority and female craft workers;
4. Maintain copies of letters to recruitment groups specifying employment opportunities;
5. Maintain records of all responses received to letters to recruitment groups;
6. Maintain a separate file for every recruitment group contacted;
7. Maintain a file of names, addresses, telephone numbers, and craft of minority and women applicants and a record of what action was taken with respect to each, including reasons why any applicant was not hired;
8. Maintain written records of contacts (written, telephonic, or personal) with minority and women's community organizations and recruitment sources, and schools and training organizations;
9. Maintain copies of letters sent to community organizations, recruitment sources, schools and training organizations at least one month prior to acceptance of applicants for training, describing openings, screening procedures, and tests to be used in the selection process;
10. Maintain copies of diaries, telephone logs, or memoranda indicating contact with minority and women employees requesting assistance in recruiting other minorities and women;

11. Maintain records of results from contracts under #10;

12. Maintain records of contributions in cash, equipment, or personnel to DOL sponsored training programs;

13. Maintain records of hiring of minorities and women from DOL sponsored training programs;

14. Maintain copies of letters to minority and women recruitment sources informing them of DOLtraining programs;

15. Maintain a written equal employment opportunity policy, including identification of the EEO officer;

16. Include EEO policy in the company's policy manuals;

17. Post a copy of the EEO policy at all job sites;

18. Maintain documentation that EEO policy has been discussed with every minority and woman employee;

19. Maintain documentation that EEO policy has been discussed regularly at staff meetings;

20. Have copies of newsletters and annual reports that include the EEO policy;

21. Send copies of letters at least every six months or at the start of every new major contract to all recruiting sources stating the company's EEO policy;

22. Maintain copies of advertising with EEO statement;

23. Maintain copies of letters to all subcontractors and suppliers requiring compliance with EEO policy;

24. Maintain records of annual reviews of minority and female employees for promotional opportunities;

25. Maintain records of encouragement of minority and female employees to seek promotions;

26. Maintain records of annual review with supervisory personnel of affirmative action obligations, including identification of time and place of meetings, persons attending, subject matter discussed, and disposition of subject matter;

27. Maintain certifications that testing, interviewing, and selection procedures meet government guidelines;

28. Maintain documentation that the EEO officer reviews all monthly workplace reports, hirings, terminations and training;

29. Have a written job description for the EEO officer including the duty to monitor all employment activities for discriminatory effects;

30. Maintain documentation that corrective action has been taken whenever a possible discriminatory effect is found;

31. Include in all subcontracts and purchase orders a government "Certification of Nonsegregated Facilities;"

32. Maintain records that prove that notices of parties and picnics have been posted and are available to all employees;

33. Maintain records of contacts with supervisors to insure privacy between the sexes with respect to toilets and changing facilities;

34. Maintain records of all contacts from minority or women subcontractors;

35. Maintain records of assistance provided to minority or women subcontractors in preparing price quotations;

36. Maintain records of all minority or female subcontracts awarded, with dollar amounts;

37. Maintain copies of solicitation to minority or female subcontractors for projects bid;

38. Submit reports to the government regarding EEO activities;

39. Maintain records for each employee of name, address, telephone number, trade, social security number, race, sex, position, dates of change in position, hours worked per week, rate of pay, and locations of work; and

40. File a monthly employment utilization report, covering work force on private projects in the area.

Failure to document just one step can result in a finding of noncompliance requiring the contractor to sign a conciliation agreement containing even more reporting requirements or face potential debarment.

The incredible paperwork burden imposed by these regulations substantially increases the overhead of federal construction contractors. A recent survey of ABC members revealed that E.O. 11246 creates an average of an additional 16 hours of paperwork each month and increases administrative costs by an average of 13.6 percent (See Table C).

Table C
Impact of Paperwork Required
by Executive Order 11246

	General Contractors	Heavy Contractors	Specialty Contractors	Average
Increased administrative costs due to the E.O.	13.2%	15%	13.6%	13.6%
Hours spent on paperwork	18.7 hrs.	30.9 hrs.	11.7 hrs.	16 hrs.

SOURCE: March 19, 1981 Survey of the Membership of Associated Builders and Contractors.

Small contractors, when faced with the recordkeeping and reporting requirements imposed by OFCCP, are unable to effectively compete on federal work. These small businesses, which usually have a small labor force and offer limited job opportunities, incur administrative costs which are far greater than any gain in minority and female employment opportunities.

In the proposed regulations, OFCCP attempts to reduce the paperwork and reporting burdens of the program by permitting the contractor to "demonstrate" rather than "document" its actions under the steps. However, the term "demonstrate" and how it differs from "document" is unclear.

The proposed regulations also reduce the current 16 affirmative action steps to nine steps. However, this reduction in steps is achieved largely through consolidation rather than elimination.

With respect to the nine steps, ABC specifically recommends that OFCCP:

- Delete any reference to a specific number in step "a." The step requires a contractor to "assign two or more women to each construction project" where possible. This requirement is not only impractical, it is a quota (See discussion supra).

- Replace in step "h," the phrase "not later than one month" with "at a reasonable time." The provision refers to the time a contractor must send information to organizations with respect to apprenticeship and training opportunities. ABC believes the suggested change would make the regulatory process less cumbersome and more reasonable.

ABC welcomes OFCCP's attempt to reduce the mindboggling compliance and paperwork requirements for construction contractors. However, we believe that something more must and can be done to reduce these burdens without adversely affecting basic affirmative action objectives in the construction industry.

Many of the paperwork requirements involve outreach and recruiting efforts. ABC believes that a much more effective and efficient program of outreach and recruiting can be implemented through state employment service offices around the country, all under the umbrella of the U.S. Employment Service. These offices should develop ongoing working relationships with education and training organizations and community groups in order to develop lists of qualified applicants. Contractors could then simply solicit referrals from the Employment Service. This system would be more effective than the haphazard scheme of each contractor individually trying to search out the groups and develop confidence in the quality of referrals. This would also reduce the compliance and paperwork burdens for the contractors to a more rational level.

Under this linkage system, a contractor would satisfy his affirmative action outreach obligations by soliciting referrals from the Employment Service and by considering in "good faith" these referrals for employment. As under current rules, an employer would retain full authority to decide whether the individuals referred are qualified. While there would be no presumption that referrals are necessarily qualified for particular jobs, an employer would have to consider all referrals in "good faith."

Application to Private Work (Section 60-4.3)

The proposed regulations provide that "(c)overed construction contractors performing construction work in geographical areas where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is being performed." This provision requires federal contractors to meet minority and female goals on private work located outside the geographic area of their federal project. It is the responsibility of the contractor to ascertain what the OFCCP utilization goal is for the area where the private work is being performed.

Therefore, a contractor, who has one federal contract, must comply with all of the federal affirmative action requirements on all work, no matter where it is or whether or not federal monies are involved.

ABC believes that to mandate goals and timetables on private (non-federally funded) construction merely because a contractor has one federal contract is a blatant misuse, and perhaps a legally insufficient extension, of regulatory authority. Neither current statutory nor Executive Order authority grants OFCCP jurisdiction to review private (non-federal) work in areas where a federally funded contract does not exist. Further, OFCCP has never cited specific authority to support extending E.O. 11246 requirements to a covered contractor's non-federal projects in geographical locations where the contractor has no federal project. This rule expands OFCCP into areas where its authority is questionable.

In addition, the economic considerations and administrative burdens of this rule create a non-competitive position for the federal contractor in the private sector. The cost liabilities preclude the federal contractor from competing on an equal basis with non-covered contractors. It certainly cannot be the intent of OFCCP to be a weighted variable among competing companies in the private sector.

Therefore, OFCCP has created a situation where federal contractors are being forced from the private sector, while other contractors are refusing to bid on federal work. This will result in two classes of construction contractors: one which does solely federal work; the other which performs only private sector work.

Based on the March 1981 membership survey, ABC estimates that the extension of OFCCP requirements to all private work of a federal contractor increases his administrative costs by approximately 25 percent. This added cost is directly passed on to the federal government at the expense of the taxpayers.

In light of OFCCP's questionable legal authority and the additional costs associated with this extension to private projects, ABC recommends that OFCCP amend its regulations to include only those projects in the covered area.

Reports and Other Required Information (Section 60-1.7)

Currently, section 60-1.7 (a) requires a contractor with 50 employees and a contract of $50,000 to file the Standard Form 100 (EEO-1 report). OFCCP proposes to raise the threshold for filing form EEO-1 to cover contractors having 100 or more employees and a contract of $50,000. Further, the proposal does not provide for the aggregation of contracts to reach the $50,000 level.

These provisions indicate a desire to take a positive step toward reducing the administrative costs of small contractors. However, ABC suggests that OFCCP conform the threshold for the filing of the EEO-1 form for the construction industry to the thresholds for other affirmative action requirements (See discussion supra).

Section 60-1.7 (b) currently requires contractors and subcontractors to make certain certifications in their bids with regard to certain aspects of affirmative action compliance. Many prime contractors have been obtaining the same certifications for their subcontractors. This requirement has resulted in a major paperwork burden for the submitting subcontractors and the receiving prime contractors. ABC welcomes the proposed elimination of the subcontractor certification requirement.

Segregated Facilities (Section 60-1.8)

Section 60-1.8 (b) currently requires a certification that a contractor's facilities are not segregated. The proposal deletes the certification requirement, but continues to require contractors to maintain non-segregated facilities. ABC supports the elimination of this reporting requirement as it is unnecessary and superfluous.

Pregnancy, Childbirth and Related Medical Conditions (Section 60-1.24)

The proposed regulations do not adopt the language contained in 29 C.F.R. 1604.10 (c) which requires employers to provide disability leave for pregnant employees even if they do not provide leave for other disabilities. ABC agrees that this language is not necessary because section 60-1.24 adopts other guidelines relating to pregnancy-related medical conditions. Section 60-1.24 requires women affected by such conditions to be treated, for fringe benefit purposes, the same as other persons not so affected, "but similar in their ability or inability to work."

Sexual Harassment (Section 60-1.25)

Section 60-1.25 imposes strict liability on an employer for sexual harassment by its officials, managers and supervisors, regardless of whether the acts were authorized or forbidden, and regardless of whether the employer knew or should have known of the harassment. Where harassment occurs between fellow employees, and an employer knew or should have known of that conduct, and fails to take immediate and appropriate action, the contractor is liable for sexual harassment.

ABC believes that extending a contractor's liability to an act about which he "should have known" is unreasonable and impractical. Liability should be limited to acts only about which the contractor actually knew.

The proposed rule does not adopt the concept of holding an employer liable for the acts of its customers and clients. ABC feels that for DOL to adopt a provision which makes contractors liable for acts of sexual harassment by non-employees would extend employers liability into an area over which he certainly has no control.

Access to Records (Section 60-1.43)

Section 60-1.43 currently requires a contractor to permit OFCCP access to his records for inspection and copying. The discussion of Item 23 states that computer tapes and printouts were specifically excluded from the listing of specific types of data to which contractors must permit access in the investigation or compliance review. However, Item 23 maintains that it is not intended that OFCCP be precluded from obtaining computer tapes and printouts "in appropriate circumstances." No where is an "appropriate circumstance" defined or explained and, more importantly, the proposed regulation does not state that computer tapes and printouts are not to be included. This will lead to confusion and uncertainty at the time of an investigation or compliance review.

Further, OFCCP proposes to amend the language of the existing regulation which provides that information obtained under this section will be used only in connection with the Executive Order and the Civil Rights Act of 1964. This language is being deleted because the OFCCP is apparently fearful of violating the Freedom of Information Act. Although OFCCP assures that it is sensitive to contractor concerns regarding the possible confidentiality of data gathered in compliance reviews, ABC is skeptical that the steps taken to ensure that confidential data is not routinely released are sufficient to protect such confidentiality.

Conciliation Agreements (Section 60-1.65)

OFCCP automatically demands that contractors who have failed to meet their minority/female utilization goals must sign a conciliation agreement. Contractors have been given no opportunity to negotiate the terms of the agreement. There is no term defining the bounds of the conciliation agreement. There is no expiration date in the conciliation agreement. Should the contractor be found in noncompliance with the conciliation agreement, he is subject to immediate enforcement action.

ABC urges OFCCP to work with contractors to improve their affirmative action performance when they are found to be in deficiency. We suggest that rather than requiring the immediate signing of a conciliation agreement that OFCCP grant a contractor a 30-day grace period to correct deficiencies in his affirmative action program. No compliance action should be initiated unless a contractor has failed to act during the grace period. In addition, since during the life of the federal contract, OFCCP retains the right to monitor a contractor's compliance with its affirmative action obligations, the duration of a conciliation agreement should similarly be limited to, at a maximum, the life of the federal contract.

Back Pay (Section 60-1.71)

OFCCP proposes to not seek back pay for a period longer than two years prior to the date on which OFCCP or its predecessor compliance agencies notified the contractor of a potential compliance problem involving back pay.

ABC notes once again that efforts by the agency to obtain back pay or other retrospective remedies (e.g., "make-up" hours for underutilized minorities and women) are not supported by either E.O. 11246 or its underlying statutory authority. Such efforts also conflict directly with the decision of Congress in Title VII of the Civil Rights Act of 1964 to reserve to the federal courts the power to impose remedies for individuals.

Back pay is per se retroactive. It bears no reasonable relationship to the covenant to take affirmative action in the future. It does not contribute to the prospective increase in available labor comtemplated by the Executive Order's non-discrimination requirement. Thus, back pay remedies are not related to the purpose of the affirmative action obligation.

ABC recognizes that the agency must have a mechanism to promote compliance with the program. Such specific sanctions for noncompliance are enumerated in Section 209 of the Executive Order. In addition, contractors should be made aware that specific allegations or evidence of discrimination will be referred to the Equal Employment Opportunity Commission.

Written Affirmative Action Plans for Non-Construction Employees of Construction Contractors

ABC supports the withdrawal of the provision which would have mandated that construction contractors with 50 or more non-craft personnel and federal contracts totalling $50,000 to adopt and implement a written, detailed affirmative action program for the contractor's non-craft personnel. The provision would have required a contractor to develop detailed written plans at each construction project.

Contractors would have been required to adopt two separate affirmative action programs, for on-site and off-site employees in accordance with two different portions of the OFCCP regulations. Construction contractors already have substantial affirmative action and paperwork requirements under Part 60-4. The addition of the provision would have created a harsh and unfair burden on the construction industry. Therefore, ABC strongly supports the decision to exclude this provision from the proposal.

Summary

ABC believes that the government's affirmative action program has failed to meet its objectives. Further, the commitment to ease federal regulatory burdens on private industry and reduce the cost of the federal government has not been met by OFCCP to the fullest possible extent as evidenced by the regulations proposed on August 25, 1981. Although ABC commends the Reagan Administration for taking an important step toward regulatory reform, ABC believes that the proposed regulations will not cure the current problems and unnecessary costs associated with OFCCP's affirmative action program.

Rather than increasing the numbers of minorities and women in the construction industry, OFCCP has created a mindboggling maze of paperwork and procedures through which a contractor must find his way. A simple pruning of the maze will not simplify the quest of the construction contractor. In order to effectively free the contractor from unnecessary regulatory burdens, OFCCP must strike at the root of the problem. Therefore, ABC recommends that Congress and the Reagan Administration develop and implement an affirmative action strategy encompassing recruitment, training and hiring of minorities and women. Such a strategy will create significant opportunities for women and minorities in the construction industry and fulfill the mandate of Executive Order 11246.

ABC urges Congress and OFCCP to fully consider ABC's recommendations and comments and meet the pressing need for sufficient reform in the area of affirmative action.

Senator WILLIAMS. Thank you very much, Mr. Bridge.

We have some questions that I would like to submit in writing for a written response.

Now if we could have a bit of general discussion here, there is one particular question that Senator Hatch did want me to address to you all, and it is this: You have heard testimony from the Women for Blue Collar Jobs, raising two points. First, without the women in construction project women would be effectively barred from construction employment; and second, construction hiring goals are a necessary tool to insure that women move into the construction workplace.

Do you want to make comments, each of you, in response to these observations made by Women for Blue Collar Jobs?

Mr. Blunt?

Mr. BLUNT. Senator, would you repeat that second point?

Senator WILLIAMS. Construction hiring goals are a necessary tool to insure that women move into the construction workplace.

Mr. BLUNT. I will answer the second one first, and I would say yes, without goals and timetables not much happens. However, I think the fact of the matter is that business, particularly union contractors, we are constrained by our collective bargaining agreements and depend almost entirely on the referral process from the hall of the unions to get people in.

We do not see the same kind of pressure put on the union side of the house. We have to work together. Quite frankly, when we talk about training and apprenticeship, it is through that route that they join us in unionized businesses so that kind of pressure needs to be put on them and kept on the contractors.

However, on the other side of the coin the bottom line is what is difficult for all of us to understand: In a competitive process, where everyone is bidding against everyone else to achieve a result at the lowest cost, we need to be compensated for some kind of a special effort. We in private business need to do all those things that we can to make up for the deficiencies in the past and to create opportunities but there has to be some kind of incentive.

Perhaps as you look at ways in which the Government resources might be used, you might think of a reduction or elimination of retainage, for example, for affirmative thrust on the part of contractors who achieve these goals through internal affirmative pushes in this direction. You might look at funding training programs because it costs money to provide this training. You might look at, perhaps, selected negotiated contracts with private industry to give them an incentive to provide the opportunities, without pressure, to women and minorities.

Mr. CHASTAIN. Senator, I do not believe, maybe, that we have the evidence in whether or not they are necessary. The promulgation by the OFCCP of the female goal, which has now increased to its maximum 6.9, is the part which has been the difficulty and you might say the problem between the contracting industry and the OFCCP. The training essential to women to become qualified is just barely underway, and the ability of women to gain experience so that they could enter the industry—as this association testified some 2 or 3 years ago at the promulgation of those regulations—has turned out to be true.

With the exception of certain preapprentice, leading to apprenticeship programs for women, and the regulation of which applicants for apprenticeship must attain 20 percent of each class, we have seen very little come out of the only available and approved training program to the Federal and Federal-aid construction industry. One of the difficulties is the assimilation of these women into the union labor force.

Contrary to what was stated here before, organized labor is not covered by Executive Order No. 11246, and exclusive hiring-hall referral procedures do not permit the request of women or minorities exclusively. This is indeed discriminatory and is against proper procedure.

There is no question that the women that have gained skills are being assimilated into the industry. Mr. Bridge stated that there is a shortage of some 2 million workers in the construction work force, and down the road that need is going to become ever more imperative. I think it was brought out by the lady from the blue-collar women that they were indeed constructive, that they worked hard, and they appreciated their jobs, and that they accumulated the training and they found that the work was rewarding.

I think that is indicative of the fact that the industry, the construction industry as represented by the many firms that AGC represents, will gladly accept anybody who is qualified and who will produce, be they minority or be they female. What is essential is to fill the gap between unskilled and skilled, and so I do not think the evidence is in.

Senator WILLIAMS. Mr. Bridge?

Mr. BRIDGE. Let me comment, in regard to goals, whenever the word goals comes up it automatically brings up the word quotas. Certainly goals, the concept of goal or the dictionary definition is fine, and we have no problem with the word goal. However, too often that is transferred over either overtly or covertly to the word quota and then we have a big problem. I think that 6.9-percent women is a typical case of something which is set as a quota goal and which has proved out to be entirely unreasonable.

Now one of the statistics to back up the unreasonable nature of the 6.9-percent quota goal is the fact that in training programs and in apprentice programs throughout the country, generally speaking the average is 2.5 percent women. This backs up what several witnesses have said, including ABC's position that training is at the heart of the problem.

Therefore, it is our suggestion that OFCCP refocus on supporting the development and implementation of innovative and untraditional recruiting and training programs. I wanted to point out that our written statement has some suggestions in that regard.

Senator WILLIAMS. Could you briefly describe some of your suggestions?

Mr. BRIDGE. I will ask Colette Nelson to address that.

Ms. NELSON. Senator, if you will recall, last year Senator Schweiker had a bill in which would have required the U.S. Employment Service to contact minority and women's organizations and groups to act as a referral system for contractors. This not only would consolidate the type of effort that we are trying to make; it would also relieve contractors of some of the incredible paperwork burden they currently have. More importantly, it would serve as one clearing point for recruitment of minorities and women.

One of our other recommendations is the development of some innovative and untraditional training programs. Currently, for Federal contractors to hire apprentices, they essentially have to go to only Bureau of Apprenticeship and Training approved programs, and the requirements are very strict.

Many groups in the country are developing new programs. ABC is in the process of developing a "Wheels of Learning" program which we think is innovative and which will help solve this problem, but I think the Government and private industry need to explore more and more some innovative training programs that will speed up the process and decrease the cost of the process in the construction industry.

Senator **WILLIAMS**. Where does vocational education fit into your world of construction? Just as a casual comment, and it may not be accurate at all, it just seems to me that there is a limited amount of training for some of the highly skilled work in construction in the vocational schools that I know anything about.

Mr. **CHASTAIN**. I think it is about 35 years overdue, Senator. Probably the greatest lack in raising those interests, those people that are interested in the trades, is that lack after they leave high school where they should have gotten the training which might have started them down that road to increasing their opportunities.

Having been involved in the construction and compliance field since prior to the promulgation of the Executive order, and having many times commented and testified on the problems with the program, it has been frankly mind boggling to me personally as to why we spent 15 years pounding on each other when indeed the construction industry has the jobs that these people want, and the people, the way they get them, is starting in what you might call vocational training.

It is also staggering to me that the Federal Government advertises for men and women to come join the U.S. Army, the Navy, and the Marines, and they will train them to perform a task. We have housed and educated Haitians and Cubans, very hastily and very well, but for 15 years we have not solved the need of giving minorities and females the opportunity to learn at their own speed and at their own option a construction skill so they can get a job in an industry that pays pretty well.

I think it is time to look it hard in the eye and say the best way to give them an opportunity, or any disadvantaged the opportunity, is to say: "There is a training opportunity. You go get it, and if you finish it you are equipped to compete head-on with those that are in the industry at the present time."

One of the difficult problems is that for 15 years we have not done this, and until such time as we reach back and meet the problem head on, we are going to continue to accrue an antagonism between Government and industry. I would say from my experience, any contractor that wants to do a job will take a good working individual, be he merit shop or be he union, if he gets in and works and he knows his trade.

Contractors are bidding as the lowest competitive bidder to do Federal and Federal-aid work, and they are betting their brains on the ability to make that and make a buck. They need qualified people. Why not put those qualified people in place so they can have the opportunity to go to work? Vocational education is right back at the start, and I agree with you 100 percent.

Mr. **Blunt**. Senator, I would like to comment on that. Here in Washington there are several vocational schools, and what I have found from my experience is that it is difficult to get people at that level into training programs because of the certification process. The apprenticeship council is the certifying authority for people who carry the designation of "apprentice," and this is I think prescribed through Department of Labor regulations.

Of course, contractors have very little control, in fact, no control over that certification process. It might be a fertile ground for review or exploration to determine to what extent people are coming out of vocational schools and entering into the business of being journeymen or actual apprentices. I do not think there is much control the contractor has over that process.

Mr. **Bradshaw**. May I for a moment add onto that?

We have just recently communicated, AGC, with over 5,000 vocational educators. We have developed and have had developed for several years what we call competency-based training programs with curricula that are available, have been available.

We had one difficult time getting them approved by the Bureau of Apprenticeship and Training. It took 10 years to get them to agree that a competency-based program was an acceptable one as far as they were concerned.

At any rate, we have just made contacts with all the vocational schools. We are alerting them to the availability of these six craft curricula that are already available, and we are beginning to launch a program. We are stepping back and saying, "This is where we need to start."

Ms. **Nelson**. Senator, we have found over and over again that one of the main problems that we have in recruiting anyone into the construction industry is a lack of knowledge of the industry—and I think it is true of a lot of trades—among vocational guidance counselors in the country. Again, ABC is also trying to correct that but it is, of course, a long-term process.

Another of the problems that we have is, individuals are always startled to find that the average apprenticeship program in the construction industry is 3½ years. Now an individual is working while they are in the training process but, nonetheless, that is a long time for individuals to reach the journeyman process, and a lot of people hesitate to train that long. There is a feeling that, "Gee, I might as well have gone to college," is the attitude many times.

Senator **Williams**. Very interesting.

Mr. **Bridge**. I want to comment that I think your question on vocational education is very appropriate. In the State of Maine there has been a process over the last 10 years, roughly, that has led to post-high school vocational education, the vocational/technical institutes, and that has been a great source of help, skilled help for us, trained help.

Another program that has been instituted at the university is the so-called 1-year tech program, which is a 2-year program for engineering students who want to stop, who do not want to go to the 4-year program. That has been a help by integrating in programs between the high school and college level. That has been a great help.

One thing that sometimes worries us in construction is the changing attitude of society toward hard work. I just think the construction industry has to face that in a recruitment program: Are our youngsters interested in the hard work that construction is?

A little story to illustrate that is the fact that on one résumé—we were doing some hiring about 3 years ago—and on one résumé we looked down through it and we saw something which looked very attractive to us. It turned out that we hired this individual and he turned out to be an excellent worker. What he had down at the bottom was that he worked three summers as a clam digger. We knew we had a good man. [Laughter.]

Senator WILLIAMS. It has been a very, very helpful panel, and I appreciate it. I know that the chairman of our committee will too. We will look forward to other materials that will come in response to our questions.

Mr. CHASTAIN. Thank you, Senator.

I would like to say that the Associated General Contractors would be pleased to be invited back during the December hearings when you formulate the findings of your testimony.

Senator WILLIAMS. That will be done.

Mr. CHASTAIN. Thank you.

Senator WILLIAMS. Thank you very, very much.

At this point I order printed all statements of those who could not attend and other pertinent material submitted, for the record.

[The material referred to follows:]

(203) 520-6855

CCIA

CONNECTICUT CONSTRUCTION INDUSTRIES
ASSOCIATION, INC.

1290 SILAS DEANE HIGHWAY, WETHERSFIELD, CONN. 06109

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May 11, 1981

The Honorable Orrin Hatch
Chairman, Senate Labor and
Human Resources Committee
Senate Office Building
Washington, D.C. 20510

Re: OFCCP Contract Compliance Regulations Implementing Executive Order 11246

Dear Senator Hatch:

The Connecticut Construction Industries Association (CCIA), which represents over 100,000 men and women employed in the construction and related industries and which has both minority business enterprises and non-minority business firms as members, wholeheartedly agrees with your recommendations to modify overly-stringent, costly, burdensome and ineffective Labor Department contract compliance requirements affecting construction contractors.

It is true that OFCCP is more concerned with contractors following the 18 or so affirmative action steps to the "letter" than with the actual final results of the contractors' affirmative action efforts!

In a recent case in Connecticut, one of our CCIA member firms was audited by OFCCP. While the conscientious contractor not only met, but exceeded his affirmative action goals (quotas) established by the Connecticut Department of Transportation for affirmative action in hiring of minorities and women and in recruiting minority and womens' business enterprises, he nevertheless, was cited by the OFCCP for failing to implement some minor record-keeping requirements dealing with a few of the so-called 18 affirmative action steps! OFCCP apparently threatened the contractor with debarment and sanctions unless the contractor signed a conciliation agreement or letter of commitment to remedy the paperwork reporting miscues. The OFCCP then drafted the letter for the contractor and coerced the signing by threatening punitive action unless it was signed.

This modus operandi is absurd given the contractor's good faith efforts and positive performance! Obviously OFCCP is more concerned with nit-picking paperwork procedures being followed than with

The Honorable Orrin Hatch
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the goal of creating jobs. Perhaps this is because OFCCP is more concerned with maintaining jobs for its own employees through increased generation of compliance requirements and "make work" tactics. OFCCP has lost sight of the purpose and intent of the Executive Order 11246 and is more concerned with form that content.

It is CCIA's position that Executive Order 11246 should be abolished as an excessive, preferential requirement which is doing more harm than good in terms of generating jobs for minorities and women. Certainly, equal opportunity in employment is a desirable goal; however, to require affirmative action forever, mandating illegal hiring quotas and necessitating voluminous paperwork reporting (despite the good faith efforts of contractors at contract compliance) is not in the public interest and is counterproductive.

Respectfully,

Arnold L. Beizer

Arnold L. Beizer
Assistant to the President

ALB:cg

cc: EEO Committee Members

Mechanical Contractors Association of America, Inc.
Suite 750, 5530 Wisconsin Ave., Washington, D.C. 20015
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June 5, 1981

The Honorable Orrin G. Hatch, Chairman
Labor and Human Resources Committee
United States Senate
Dirksen Senate Office Building, Room 4224
Washington, D. C. 20510

RE: OFCCP Regulations

Dear Senator Hatch:

The 1700 member firms of the Mechanical Contractors Association of America, Inc., are committed to equal employment opportunity, and this association, for almost fifteen years, has had an Equal Employment Opportunity Committee to advise our members on how to comply with the laws. Since 1978 we have been extremely concerned, however, about regulations promulgated and enforced by the Office of Federal Contract Compliance Programs, U. S. Department of Labor.

In general, we believe that the regulations have overstepped the boundaries of the law, set unrealistic requirements, stressed paperwork and reporting rather than the recruiting and training of minorities and women and placed an uneconomic burden on the construction industry.

We believe very strongly that the role of the government should be to assist the industry in achieving equal employment opportunity, as opposed to policing the industry in an adversary manner.

We are encouraged by recent trends to revise the regulations; but we are concerned that present proposals to change the regulations, which have been sent from the Department of Labor to the Office of Management and Budget, do not include all those changes necessary to make the regulations conform to the law and meet the objectives of encouraging minorities and women to enter the industry; nor do they entirely meet the concerns of this industry.

It is our understanding that your committee is considering conducting oversight hearings on OFCCP. We urge you to do so and to review all aspects of that agency's operations, including their method for establishing regulations, which prior to 1981, did not include consultation with the industries affected by the regulations; the justification for setting goals and timetables; the method of determining the goals, particularly in regard to women in construction; the applicability of the regulations to the business practices of the industry, particularly the union-employing

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Page 2.

construction industry; whether the extensive record keeping and paperwork requirements imposed on the construction industry have helped to achieve the objectives of the law; whether the agency's enforcement procedures are equitable and justifiable and what steps can be taken to assure government/industry cooperation to achieve equal employment opportunity.

Such an examination by an independent source, such as your committee, would assure that all facets of the regulations and operations have been considered before final changes to the regulations are made.

This association would be glad to testify at the hearings.

Sincerely,

Frank J. Salatto, Chairman
Equal Employment Opportunity Committee

FJS/jaf

cc: Vice President George Bush
Ms. Diane Perkley, Acting Associate
Deputy Solicitor for Regulatory Affairs
MCAA Executive Committee
MCAA Equal Employment Opportunity Committee

American Council of Life Insurance

1850 K Street, N.W.
Washington, D.C. 20006
(202) 862-4000

July 30, 1981

Honorable Orrin G. Hatch
Chairman, Senate Labor and Human
  Resources Committee
U. S. Senate
411 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

As discussed on the phone with Mr. Flores of your staff, the American Council of Life Insurance would like to have the opportunity to present its views to the Committee concerning regulations issued by the Office of Federal Contract Compliance Programs ("OFCCP"). The Council represents over 500 life insurance companies which account for 95 percent of the life insurance in force in the United States, 99 percent of the reserves for insured pension plans, and 97 percent of the assets of all life insurance companies in the United States.

We understand that the Labor and Human Resources Committee has been examining OFCCP regulations on July 29 and 30 as part of the Committee's regular oversight hearings. We have been informed that, while it will not be possible for the ACLI to testify at these initial hearings, the Committee would welcome written comments from us. Accordingly, a written statement is attached for inclusion in the record of the hearings.

As you may know, regulations issued by the OFCCP may affect life insurance companies in two ways--as employers and as issuers of insurance products. With regard to the insurance product area, the Council is very concerned by the OFCCP's recently issued revision to 41 CFR §60-20.3(c)1 that would require government contractors to provide equal benefits to similarly situated male and female employee benefit plan participants--regardless of the cost of such benefits (i.e., an "equal benefits" rule). The effective date of this rule, which was published in 45 Fed. Reg. 86216 on December 30, 1980, has been deferred until August 26, 1981.

As detailed in the enclosed statement, an equal benefits rule ignores the acknowledged actuarial fact that women live longer than men and that, therefore, benefits payable for the life of an individual, or on his or her death, will vary in cost depending on the sex of the insured. Although the rule is doubtless well-intended, the speculative benefits of imposing it are far outweighed by the increased costs that would be imposed on employers. These higher costs might very well lead many employers, particularly small employers, to terminate their benefit plans or eliminate employee benefit options that involve life contingencies--a result that would clearly be in the interest of neither male nor female plan participants.

We urge your Committee to review the OFCCP's position with regard to sex discrimination in government contractor-provided fringe benefits. We would hope that such review will convince you that the OFCCP rule should be rescinded.

Please let us know if we can be of further assistance. We would be glad to meet with you to discuss any questions you may have.

Sincerely,

William T. Gibb
Chief Counsel
Federal Taxes and Pensions

Phyllis H. Gerstell

Phyllis H. Gerstell
Senior Counsel

cc: John Flores

STATEMENT OF THE AMERICAN COUNCIL OF LIFE INSURANCE
OVERSIGHT HEARINGS ON THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS
THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

July 31, 1981

The American Council of Life Insurance is pleased to have the opportunity to present its views regarding certain regulations issued by the Office of Federal Contract Compliance Programs ("OFCCP") to the Senate Committee on Labor and Human Resources. The Council represents over 500 life insurance companies which account for 95 percent of the life insurance in force in the United States, 99 percent of the reserves for insured pension plans, and 97 percent of the assets of all life insurance companies in the United States.

The regulations with which the Council is concerned would amend the affirmative action requirements detailed in 41 CFR §60-20.3(c)1 to require that government contractors provide equal benefits to similarly situated male and female employees under employee benefit plans without regard to the fact that the cost of such benefits varies because of the different life expectancies of men and women.*/

This "equal benefits" proposal reverses the "either-or" approach taken in the OFCCP's prior regulations in this area. The "either-or" rule permits an employer to either provide equal benefits for similarly situated male and female employee benefit plan participants, or to make equal contributions to the plan on behalf of such males and females.

The OFCCP's proposed abandonment of the "either-or" rule is premised, in part, on the recent U.S. Supreme Court case of

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*/ This revised regulation, published in 45 Fed. Reg. 86216 on December 30, 1980, was scheduled to take effect in April 1981. It has since been suspended, pending further review, until August 26, 1981.

Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978). This reliance is, we believe, misplaced, for Manhart did not hold that periodic benefits must be equal under all plans, regardless of the life expectancies of the persons involved. Contrary to this interpretation, we believe that in Manhart the Supreme Court merely held that a requirement that female employees make larger contributions than similarly situated male employees violated Title VII of the Civil Rights Act of 1964.

As discussed below, the costs to government contractors of imposing the OFCCP's "equal benefits" requirement would be substantial. Moreover, such a requirement might well lead government contractors to eliminate such long-accepted and desirable employee benefits as:

1. Defined contribution plans (pension or profit sharing) with a life annuity or an insured death benefit as one of the benefit forms;
2. Optional benefits in defined benefit pension plans where the amounts of such benefits reflect differences in mortality by sex; and
3. "Cafeteria plans" which include benefits that reflect differences in mortality or morbidity by sex.

This elimination would occur because the "equal benefit" rule fails to recognize that the sex of an employee can have a significant effect on the cost of providing these benefits. This cost effect is the result of the acknowledged actuarial fact that women live longer than men.

Detailed Discussion--Benefits That Would Be Affected:

Pension plans are generally classified as either "defined benefit" or "defined contribution" plans. Under a defined contribution plan, the employer pays a specified amount and the periodic benefits payable to the employee upon retirement are based upon the amount of money accumulated to the time that benefits commence. By contrast, under defined benefit plans, the periodic benefit to be received by each employee or the method of determining the benefit is specified in the pension plan.

Under defined contribution plans, even though equal contributions are made by the employer on behalf of male and female employees, each periodic payment in the form of a life annuity ultimately received by female employees will be somewhat lower than that received by similarly situated males. This is because female employees can be expected to live longer than the males and will therefore receive payments over a longer period of time. This type of plan would apparently be precluded under an "equal benefits" rule.

An "equal benefits" rule would, similarly, disallow certain optional benefit forms under defined benefit plans. For example, although defined benefit plans generally provide an equal life annuity for males and females, payments under certain optional benefit forms provided under such plans (e.g., joint and survivor annuities, early retirement annuities) are often calculated to reflect the sex-based differences in mortality costs.

Certain benefits under "cafeteria plans" would likewise be precluded by an "equal benefits" rule. Under such plans the employer provides a fixed allowance (e.g., 10 percent of compensation) and the employee selects the particular benefits he or she desires from an inventory--which usually includes life and health insurance--that is provided by the employer. As the cost of insurance will reflect the proven sex-based differences in mortality and morbidity costs, insurance benefits for similarly situated males and females who allocate the same amount to the benefits under a cafeteria plan will not be equal.

An "equal benefits" rule would thus effectively outlaw this type of employee benefit plan--despite the fact that the Revenue Act of 1978 (Section 134) includes a provision specifically designed to preserve the cafeteria plan concept.

Estimated Costs: If all retirement plans in the nation were to equalize benefits, the additional amounts required would be enormous. In most cases, this would require the employer to "top up", i.e., contribute an extra amount to bring benefits into parity.

The precise cost of such equalization would depend on the total number of male and female participants affected, as well as the size of their retirement benefits. As we stated in our 1978 comments to the Department of Labor with respect to a proposed "equal benefits" rule under the Equal Pay Act, (43 Fed. Reg. 38057), the added cost to the employer could be as high as 18 percent of each retiring female employee's total account balance,*/ derived from whatever source, including employer's/employee's contributions, interest, and any forfeitures.

Clearly, the added financial burden of "topping up" might well lead many employers, particularly small employers, to terminate their plans, or at least remove the lifetime income options from them. This would be particularly true for plans that have a large percentage of female participants.

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*/ It would be in the neighborhood of 18 percent for plans under which the basic benefit is a life annuity and in the neighborhood of 12 percent for plans under which the basic benefit is a life annuity with a minimum guarantee of ten years payments.

It is often claimed that the cost problems associated with "topping up" could be avoided if the insurance business would adopt so-called "unisex" pricing. This is simply not true.

Unisex tables would create severe problems of anti-selection and would result in higher costs for many plans, including particularly those of small employers. If you start with the assumption that the price of the insurer's annuities would be put at a point between the male and female rate, large employers with disproportionately large male working populations would not use these products to fund their pension plans--since the pricing of the annuities would reflect the higher life expectancy costs of females.

The gradual elimination of larger, male dominated, groups from the annuity purchasing market would cause annuity rates to rise. Each cost adjustment would eliminate even more purchasers, with the end result that the unisex annuity cost would evolve to the female cost. These higher costs would fall most heavily on the small employer who, as a practical matter, cannot self-insure. Rather than incur these increased costs, many small employers would undoubtedly simply opt to remove the benefits or options that an "equal benefits" rule precludes.

Recommendation: As discussed above, the end result of an "equal benefits" rule would be to lessen employee benefit options--to the detriment of male and female employees alike. We therefore strongly believe that the OFCCP regulations that would mandate an "equal benefits" requirement should be rescinded and that the Office should follow the "either-or" approach taken in the prior regulations issued under Executive Order 11246, 41 CFR §60-20.3(c).

Women's Work Force
A project of **Wider Opportunities for Women, Inc.**
1511 K Street N.W., Suite 345, Washington, D.C. 20005 (202) 638-3143

October 21, 1981

Mr. John Flores
Senate Labor Human Resources Committee
U.S. Senate
Washington, D.C. 20010

Dear Mr. Flores:

Thank you for receiving our testimony for the record. We greatly appreciate your assurance that Senator Hatch will introduce our comments from the chair tomorrow morning during the hearing.

We are very interested in the Committee's plan to look for effective solutions to the enforcement problems that have been raised. Our study, which will conclude this fall, has uncovered many novel suggestions from contractors, union officials, women's programs, and women themselves which I believe you would find interesting during the December hearing. We hope you will ask our Executive Director, Jane Fleming, to share our findings with the Committee at that time.

I will send you an outline of a few of our ideas for the December hearings later this month. I would also be happy to meet with you to discuss our thoughts at your convenience.

Thanks again for your assistance in getting our testimony to the Committee and hearing's particpants tomorrow.

Sincerely,

Laurie Westley

Laurie Westley
Employment Discrimination Projects
Coordinator

Other programs
Nontraditional Work Programs /In the building trades, electro-mechanics, auto mechanics, electronics. 755 8th St. N.W., Washington, D.C. 20001/(202) 783-5155
Career Development Services /Career planning, job search, special projects

WOW
Wider Opportunities for Women, Inc.
A nonprofit tax-exempt Women's Employment Organization
1511 K Street N.W., Suite 345, Washington, D.C. 20005 (202) 638-3143

TESTIMONY

For The

Senate Labor and Human Resources Committee

presented for the record by

Wider Opportunities for Women, Inc.

October 21, 1981

Women's Work Force /A national resource and advocacy network of women's employment organizations
Career Development Services /Career planning, job search, special projects
Nontraditional Work Programs /In the building trades, electro-mechanics, auto mechanics, electronics 755 8th St., N.W., Washington, D.C. 20001 (202) 783-5156

Background On Wider Opportunities For Women, Inc.

Wider Opportunities for Women, Inc. (known as WOW), is a 17 year-old independent, nonprofit organization which works to expand employment opportunities for women. Since 1964, WOW has provided direct services to women seeking assistance in entering or re-entering the job market. For the last 10 years, we have pioneered in developing employment programs for women in skilled, well-paid nontraditional occupations, in working with employers and unions to develop a partnership for effective hiring and promoting of women, and in serving as advocates for women in the development of federal employment policy.

This work has occurred in many forms. For 10 years, our Nontraditional Work Programs have offered hands-on skills training in a variety of skilled occupations, including construction. As a result, several years ago WOW became involved in a suit against the Department of Labor, Advocates for Women v. Marshall. The genesis of the suit was the lack of enforcement, by the Department of Labor, of Executive Order 11246, as amended by Executive Order 11375. One result of this suit was the establishment of nationwide goals and timetables for women in construction. They were established in April, 1978 for a three-year period. The goals are stated as a percentage of the total number of hours of work. Currently, they are applicable to the contractor's aggregate on-site construction work force, whether or not part of that work force is performing work on a federal or federally assisted construction contract or a subcontract. Goals for the utilization of women apply nationwide to all construction crafts. The goals and timetables for women were as follows: from April 1, 1978 to March 31, 1979 -- 3.1%; from April 1, 1979 to March 31, 1980 -- 5.0%; from April 1, 1980 to March 31, 1981 -- 6.9%.

The goals are realistic numerical objectives in terms of the number of expected vacancies and the number of qualified applicants available. Thus, if through no fault of the contractor there are fewer vacancies than expected, he suffers no sanction since he is not expected to displace existing employees or to hire unneeded employees to meet his goal. Similarly, if the contractor has made every good faith effort to include women but has been unable to do so in sufficient numbers to meet his goal, he is not subject to any sanction. The female work-hours goals are one objective measure of a contractor's affirmative action success. But they were not meant to be the sole measure.

As a result of the above-mentioned suit, a five-year Department of Labor Monitoring Committee was established. The purpose of the Committee is to oversee the implementation of the regulations and to measure their effectiveness. This responsibility includes oversight of the goals and timetables for women in construction and in the apprenticeship programs, the outreach program and the enforcement efforts of the Department of Labor. I am an appointed member of this Committee. This fall we trust that the Committee will be convened by the Department of Labor for its fourth meeting.

In 1977, WOW established Women's Work Force, a national network of women's employment programs, to monitor the impact of public policy on women's employment, to serve as a communications vehicle for approximately 100 programs across the U.S., and to strengthen the efforts of local programs through national technical assistance services. Most of the programs affiliated with Women's Work Force provide skills assessment, job counseling support services, job development, and job placement services to women. Most focus on the needs of economically disadvantaged women and work to open up new well-paid opportunities in occupations formerly closed to women -- the so-called "nontraditional" jobs.

The WOW Study

Last year WOW received foundation funding to conduct a monitoring project to evaluate the extent to which women have obtained employment on federal and federally assisted construction projects. The Center for National Policy Review has assisted in this project. The purpose of the project was to determine the confluence of elements that create a successful utilization or an unsuccessful utilization -- of women construction workers. The objectives of the project were: (1) to obtain information on the participation of women in construction projects subject to Executive Order 11246, as amended; (2) to identify problems encountered by women, women's training and support programs, contractors and the OFCCP in increasing women's participation in such projects; and (3) to identify the nature and extent of OFCCP enforcement and other activities which are designed to increase women's participation in covered construction projects.

Wider Opportunities for Women selected four locations as monitoring sites; these sites were Tucson, Arizona; Longview, Washington; Raleigh, North Carolina; and Louisville, Kentucky. The selection criteria included factors such as the presence of a construction trades training program for women, stable administration of the program, federal construction activity, monitoring experience, and geographical location, among other considerations. At each site in-depth interviews were conducted with women construction employees and applicants, women's training and support programs, contractors, union business agents, joint apprenticeship and training coordinators, BAT and OFCCP officials. Approximately 110 interviews were conducted during the project. In three of the four locations OFCCP compliance review files were examined to ascertain the degree of enforcement and compliance activities with respect to construction contractors and sex discrimination issues. Approximately 36 files were reviewed.

The data subdivides most readily into nine issues. The issues include: (1) goals and timetables; (2) access and availability; (3) paperwork; (4) workplace environment; (5) stereotypic attitudes; (6) OFCCP enforcement; (7) OFCCP complaints; (8) women's entry into the construction trades; and (9) positive and negative perceptions of male and female employees.

Now that the interviews are completed, the data is being analyzed and a final report is being produced. This report will be used as a vehicle to document and highlight the strengths and weaknesses identified in the implementation of the system to ensure that women are not discriminated against in the construction trades. Data collected by the interviews will be the basis of my testimony today.

Occupational Segregation

I am here today to talk about the women who are breaking into the well-paid nontraditional, blue-collar jobs long monopolized by men, and what affirmative action means to those women. Although there are more than 44 million women in the paid labor force today, the majority are restricted to just 20 of the 420 listed occupational categories -- mostly retail sales service, clerical, factory, or plant work. The growth of job opportunities in these traditionally female occupations has not kept pace with the growing number of female job seekers. As a result, women make up the majority (66%) of "discouraged" workers -- those who have actually given up looking for paid employment. Of those women who found jobs in 1978, only 9.9% held well-paid traditionally "male" jobs; 21.6% held sex-neutral jobs; and 68.5% of the female work force was segregated into the low-paid, traditionally "female" jobs.

Most women work and need to work -- in fact, women are the fastest growing part of the labor force. Women are entering the labor force because they and their families need the income. Yet the current wage differential between men and women is enormous; women earn 59 cents for every dollar earned by a man. To look for a moment at actual wages, one can see the impact of sex discrimination immediately. In a 1979 study on the median weekly wages of full-time workers, the Bureau of Labor Statistics reported that sales work (which has a traditionally female work force) generated $154 per week for female workers and $297 for male workers. This is frequently the case. Even in occupations which are predominantly female, men hold positions of greater responsibility, status, and financial reward. In the traditionally male occupations, the problem lies not only in the wage patterns, but in the barriers to the entrance of women. Because of affirmative action and pioneer efforts to train women for traditionally male fields in the last decade, the number of women in skilled trades increased by 80%. Yet this figure is based on the previous invisibility of women in these trades.

These gains are the direct result of the federal equal employment laws created in the 1960's to eliminate sex discrimination in the labor market. Among these laws was Executive Order 11246, as amended, by Executive Order 11375. These Executive Orders require covered contractors and subcontractors to ensure equal employment opportunity for women by eliminating discriminatory employment practices and by taking affirmative actions. Construction contractors and subconstractors working on federal or federally assisted construction projects are covered by these requirements. Through the Executive Order, the federal government endeavors to create an environment in which women seeking employment in the construction trades are assured of fair consideration without regard to their sex; by doing this, labor market imbalances created by past exclusionary practices are being rectified.

Since the issuance of the Executive Order, specific standards for the participation of minorities in the construction trades have existed. However, it was not until 1978 that the Department of Labor issued similar standards, including numerical goals and timetables, for the participation of women in construction. The Department made that decision because experience had shown that women seeking employment were not being given fair and equal consideration. In many cases both employers and unions were refusing even to consider women for these jobs.

Today I would like to discuss the three issues that the WOW study has established as vital to the continued elimination of occupational segregation by sex in the construction trades. The first issue is the need to focus resources on opening up access for women to skills training and construction employment opportunities. The second issue I will discuss is the demonstrated need for goals and timetables for women in construction. The third issue is the requirement of a vigorous OFCCP enforcement program. These are the three key issues which emerge from the WOW study. Each illustrates the extent to which the OFCCP, women workers, and women's programs must work in partnership to eliminate the long-standing occupational segregation that exists in the construction trades.

Access, Not Availability, Is the Problem

The question of whether or not there are sufficient numbers of interested women to meet the goals has been the focus of a great deal of attention. This high level of attention was shown in the WOW study by the frequency with which contractors, unions, and joint apprenticeship and training committee coordinators raised this issue. The WOW study establishes that there are many more women interested in working in the construction trades than can obtain training or employment. Therefore, the "bottleneck" occurs in access to training or jobs, not in a lack of available women who are interested in participating.

Whether contractors, unions, and joint apprenticeship and training committee coordinators do not know where or how to find women workers or, as the WOW study establishes, they simply are not attempting to discover women workers, there are numerous organizations and agencies that could assist them in meeting their goals. One obvious source is the training programs for economically disadvantaged women that are funded through public monies. These programs have placement goals that must be met as a prerequisite to continued funding. For example, one organization, beginning a pre-apprenticeship training program, held a meeting with area contractors and unions to find out how many job-ready women construction workers they would hire. The placement goals were then established on the basis of those commitments. When the women had completed the training, however, the program was unable to place one woman. These women had excellent entry-level skills, they were physically fit, but they were not hired, although male construction workers were being hired during this period. Due to their inability to place their clients, the program managers knew they would be forced to close, so they returned the money to the state. The issue here, as elsewhere, was not a lack of available women, but the inability of women workers to gain access to the construction trades.

Goals and Timetables for Women in Construction

Since the goals and timetables for women in construction were first issued in 1978, there has been endless controversy about the possibility of meeting goals, the ramifications of not meeting the goals, and how future goals should be established. The new Administration has now added to the list of controversies the question of the continued existence of the goals.

Numerous objections to the goals for women in construction were raised by respondents interviewed in the WOW study. One objection focuses upon the unreasonableness of goals for the specific contractor or union workforce while agreeing to the need for goals in principle. One contractor said, " Goals may be necessary in some cases, but not in our case." Another contractor, who had no women in his workforce, maintained that "numerical goals are not necessary on our projects. I imagine on a lot of projects they would be necessary." A third contractor said that he believed goals were necessary: "Not for me but as a whole you're going to need that. I know two or three [contractors] who won't hire women until they're forced to." One example of this mixed perspective was enunciated by a contractor who drew the line for women workers between skilled and unskilled workers; he maintained goals are needed for unskilled trades, but not for skilled trades. The distinction between skilled and unskilled trades, and to which of the two categories women should gain access, is a persistent theme throughout the study. Contractors, union officials, and coordinators are continuously making the decision about what women can and cannot do, with little or no communication with the women workers themselves.

A second objection to goals was that they were unattainable and therefore should be abolished. One contractor states, "I do not think a goal should be set because women are not available. Most women are not trained. If they wanted to work we would be over any goal set." Another contractor said, "Women aren't interested in construction." An OFCCP official agreed that there were not adequate numbers of skilled [emphasis added] women to meet the present goal. When asked why, the official replied that it was due to sex discrimination by the unions and in apprentice selection. A program operator maintained that they had no trouble recruiting interested women; she stated, "They have beaten the doors down ever since we opened; we turn away applicants." When asked if there were enough interested women to meet the goals, she responded, "Definitely." She was then asked why the goals were not being met. Her experience showed her that it was a combination of items which she listed as follows: high school and vocational education's failure to guide women into nontraditional careers: the apprenticeship system's failure to train qualified women; and discrimination by employers.

A third objection to goals was that contractors should be permitted to hire the best qualified worker available. One contractor maintained that goals were unnecessary and that contractors wouldn't/didn't follow goals anyway. "The labor market is such that the construction trades hire qualified persons regardless of race and sex. Numerical goals serve no purpose other than to burden companies with paperwork." A union business agent made a similar point when he said, "Government regulations aren't necessary in my union. All you have to do is a good job." One contractor who had never recruited or hired a woman stated, "My attitude is you have a person for a job whether they are male, female, black, yellow ... I should have the right to hire who I want to."

A variant on the concern for hiring whoever is most qualified is the desire to hire whomever one pleases. One union official responded to goals by saying, "I'm not completely sold on goals. Pretty soon there will be no jobs left for average white [male] workers." In 1979, women were only 4% of painters, 3% of machinists, 2% of electricians, 2% of tool and die makers, 1% of plumbers, and 1% of auto mechanics[1]. Given these statistics, the union official's fear appears ungrounded.

An OFCCP administrator stated, "Around here contractors only hire men. It's like something out of Charles Dickens and the Dark Ages as far as consciousness." When asked why the resistance exists, the response was that women are an unknown commodity and meant trouble on the job because men do not want women working with them. The official added that this is demonstrated by contractors permitting harassment on the job so women will quit. Another contractor suggested that the government should not differentiate at all between workers, but should allow a voluntary system, the results of which are well understood -- women are almost never considered for construction trades employment and rarely hired.

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[1] Newland, Kathleen; The Sisterhood of Man: Norton and Co., New York, 1979

Many respondents were angry about the federal government's role in construction (even though the government is a major employer) as well as the fact of government requirements. The anger is apparent in the following quotes. A union business agent stated, "The government should keep its nose out of a lot of things. The goals are necessary or there wouldn't be any apprentices. But the government shouldn't be as involved in construction as it is." A contractor addressed a similar point: "The contractors in this town resent government requirements -- they don't like having this matter shoved down their throats and will go out of their way not to comply." Another federal contractor objected to his lack of control over numerical goals set by the government. "The goal should be reduced because there's not enough women in my field to meet the goal. And because I don't have any control of the goals, I don't get involved -- I'm not sure I can fill the need." As a result, this contractor made no effort to meet the goals for women.

Amid the vociferous negative reactions to goals for women in construction were positive reactions as well. One union official stated that "Numerical goals have been necessary in the past. It's the only way to get people to hire women. If we would do the right thing to begin with, government wouldn't have to make us." A contractor with $15 million in contracts and no women in his workforce said, "Goals are the only way. Contractors are not going to do it voluntarily."

Often respondents saw goals as a transitional and limited measure. As one union business agent said, "Numerical goals are necessary until contractors come to realize women can do the job." A contractor said the same thing: "Continue the goals and contractors will accept equal employment opportunity for women in construction." Another union official said, "Goals are necessary at this time, definitely. They need to be maintained. In six more years we should begin to see some results." The generally held conclusion was that goals must be enforced.

Enforcement by OFCCP Of Executive Order 11246 Regulations

To the extent that the barriers of occupational segregation have begun to fall, there is a partnership effort underway. The combination is of determined women who want to obtain and retain jobs in the construction trades and the aggressive enforcement by OFCCP of Executive Order 11246, as amended. Without these two elements, occupational segregation will continue unhampered despite the current needs of women for increased access to high-paying, male-dominated occupations.

It is important to say at this point that we are not talking about forcing companies to seek out women who might want jobs. Instead we are talking about the enforcement of affirmative action laws that support women who are qualified for jobs but have been unable to obtain them. There are available, job-ready women, but they need access to the jobs. Enforcement of the affirmative action provisions of the Executive Order regulations can accomplish that. The workability of this partnership has been demonstrated most graphically in the coal industry. OFCCP's strong enforcement aided women who were attempting to obtain well-paid coal mining jobs. Betty Jean Hall, Director of the Coal Employment Project has data on the numbers of women who sought coal mining jobs when those jobs became available to women. Peabody Coal Company, by far the nation's largest coal producer, showed in its own affidavit that in Kentucky alone, the numbers of women applying for coal mining jobs increased as the word spread that the coal companies would have to hire women. The hiring occurred as follows:

In 1972, no women applied for mining jobs at Peabody in Kentucky;
In 1973, 15 women applied for mining jobs at Peabody in Kentucky;
In 1974, 94 women applied for mining jobs at Peabody in Kentucky;
In 1975, 291 women applied for mining jobs at Peabody in Kentucky;
In 1976, 297 women applied for mining jobs at Peabody in Kentucky;
In 1977, 720 women applied for mining jobs at Peabody in Kentucky;

and

In 1978, 1,131 women applied for mining jobs at Peabody in Kentucky.

These dramatic strides were made because of the effective enforcement of equal employment opportunity laws with affirmative action provisions. Without the effective enforcement of these laws, women cannot break the economic barriers of occupational segregation.

One often repeated complaint about OFCCP enforcement of the regulations is the paperwork burden. Contractors answered a series of questions concerning that issue. They were asked if they believed that the reporting or the application and recruitment data were unduly burdensome; if the contractor would maintain similar records notwithstanding the regulations; if the data were not maintained how a good faith effort could be determined. The contractors were also asked to suggest alternatives to the reporting and paperwork requirements.

The contractor responses to the questions of whether the reporting and recordkeeping requirements are unduly burdensome were split 60%-40% Approximately sixty percent responded that the requirements were not unduly burdensome.

Those who felt that the requirements were a fair burden made fewer additional comments. Two of those addendums were by way of suggestions to other contractors on how to ease the burden: "Set up a good system that makes it easier," and "the records are computerized so it's really not that much trouble."

Those contractors who stated that the requirements were unduly burdensome made a variety of explanatory comments. The most frequent refrain was the cost element. One respondent stated, "It costs me 50% of our corporate profits to fill out paperwork. That's junk that nobody ever uses." It should be noted for the record that the contractor who made that statement has over $1 million in contracts. Another response focusing on cost suggested the elimination of reports and recordkeeping and stated that those requirements were one reason why construction is so costly. A third contractor stated, "One person works for the government which increases our overhead and increases inflation."

Another subject of concern to the contractors who objected to the paperwork burden was the degree of benefit to either the government or to the contractor himself. One contractor succinctly stated his position, "It should be eliminated because it doesn't help me." Another contractor stated that "The reports don't do any good. The government doesn't do an adequate job of enforcing compliance." A third contractor spoke on the same subject. He advocated eliminating all recordkeeping requirements; he added as an explanation, "What the hell do you need them for? You either have women or you don't"

In answer to the question of whether the contractor would maintain records and data similar to that required by the government absent the requirement, most contractors said they would not.

When contractors stated they would like the recordkeeping requirements eliminated, they were asked how the OFCCP should determine good faith compliance with the regulations. Most contractors maintained that the recordkeeping requirements were the only workable system. One contractor responded, "Documentation is the only way to determine." Another contractor stated, "I don't see any other way for them to do it, other than the way they are doing it now, which is probably the cheapest."

Several contractors had specific suggestions. One contractor suggested, "I would rather see OFCCP establish local coordinators with personal contact -- someone I could talk to personally." Another contractor suggested a return to the pre-consolidation system of reporting to each agency for whom work is performed. One contractor responded in frustration, "I don't have any ideas. That's their problem, they solved it by dumping it off on us."

SUMMARY

By way of summary, WOW wishes to express our alarm at the questions recently posed for public comment by OFCCP and our opposition to the proposed OFCCP regulations. The very provisions which we see as vital for women to benefit from the Executive Order appear to be at risk. This is a time when equal employment opportunity laws are beginning to have an impact, and increased enforcement is vital to continue the gains women have achieved. Yet the Administration is severely curtailing the scope and the enforcement provisions of those regulations. WOW strongly suggests that the Executive Order program be strengthened. The four recommendations we suggest would accomplish that goal we urge your close attention to, and to the extent possible, implementation of, our four recommendations. The needs that underlie them were clearly established and illuminated by the data gathered in the WOW study. We recommend that:

1. OFCCP's presence with construction contractors be increased through improved enforcement of the Executive Order regulations;
2. OFCCP obtain direct jurisdiction over the construction trade unions;
3. Construction contractors increase women-targeted recruitment efforts, especially through the utilization of existing resources for women workers;
4. Successful enforcement of the Bureau of Apprenticeship and Training goal for women in registered training programs.

In closing, we wish to assure the Committee that the study's final report, available later this fall, will be distributed at that time to the entire Committee. As far as we know, the WOW Construction Contract Compliance Monitoring Project is unique. To our knowledge, it is the only study that documents the workings of affirmative action and equal employment opportunity beyond the parameters of a single program's or organization's experience. The WOW study has tried to document, compare, and make an objective assessment of this issue in several sites across the country. It is our hope that this pilot study will be recognized and used as an important piece of evidence -- evidence establishing the need for continued equal employment opportunity laws with strong and effective affirmative action provisions.

* * * *

COMMENTARY OF THE CHICAGO ASSOCIATION OF COMMERCE & INDUSTRY RE: REFORM OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

Samuel R. Mitchell,
Chief Executive Officer

Edward B. Miller, Chairman,
CACI Labor-Management Relations Committee

Dana Green
Chairman, CACI EEO Subcommittee

William A. Price,
Director, Governmental Affairs Division

Staff Contact: William A. Price (312) 786-0111 ext. 230

The Chicago Association of Commerce and Industry (CACI) appreciates the opportunity to comment provided by this forum. CACI is a voluntary organization organization of business and professional leaders working together to promote the commercial and industrial growth of Metropolitan Chicago and to foster civic improvements that benefit the general welfare of all who live and work in the area. CACI is in its 77th year of operation as the principal representative of the Chicago area business and industrial community and represents 6,500 businesses and 1,600 individual members, who employ over 1.2 million workers.

CACI POSITION

The membership of CACI endorses and supports the original concept of affirmative action. No argument can be made that those who benefit from doing business with the government should not take affirmative action, i.e. make extra effort - to ensure their employment practices afford equal access and equal opportunity to all. We believe that ensuring equal opportunity was the intended purpose of the concept of affirmative action, and we believe that a return to that original purpose is sorely needed.

Originally, there was a vision of American business seeking to provide equal employment opportunities to all of our nation's diverse population. The OFCCP has obscured that vision, leaving frustrations and resentment on all sides. The OFCCP, in its practices and by its regulations, has turned from a role of fostering progress in equal employment opportunities to that of enforcing a runaway bureaucratic nightmare. It has defined its own authority, becoming an exponent of theories of discrimination far beyond the Congressionally mandated bounds of the Civil Rights Act.

CACI endorses a return to the original objective of Affirmative Action by a revised Executive Order that would reaffirm a commitment to encouraging and assisting prospective affirmative employment efforts. In the alternative, CACI would support major changes to current regulations implementing the Executive Order.

I. THE ADMINISTRATION OF EXECUTIVE ORDER 11246 HAS UNDERMINED ITS PURPOSE AND UNDERLYING OJECTIVES

The regulations issued pursuant to Executive Order 11246, and the enforcement practices of the Office of Federal Contract Compliance Programs, have corrupted the original intent and purpose of the Order. The Order was promulgated to ensure that government contractors would make special efforts to provide equal employment opportunity. OFCCP instead has imposed a requirement of equal employment results. It has exceeded its charter and authority, and has imposed back-pay liability and other remedial relief upon contractors whose work forces do not reflect the OFCCP's expected statistical results. Actual opportunities available and employer progress in increasing the employment of minorities and women, are ignored. OFCCP has imposed upon government contractors a maze of detailed statistically-oriented Affirmative Action Program requirements, and turned the Affirmative Action process into a harassing "numbers game."

A. THE IMPOSITION OF BACK-PAY AND OTHER REMEDIAL RELIEF IS UNAUTHORIZED AND DUPLICATIVE OF OTHER AGENCIES' ACTIVITIES

Millions of dollars in back-pay have been paid by contractors. These payments have been compelled by the desire to avoid the costly, prolonged administrative process. Absent access to judicial review or any other prompt remedy for unreasonable administrative action, employers have chosen the less costly alternative of nonresistance. However, no authoritative judicial precedent exists determining that OFCCP is authorized to require back-pay, and the position that back-pay is not authorized has been compellingly briefed.[1]

In addition to its back-pay demands, OFCCP has sought other remedies from contractors similar to those imposed only after judicial findings of discrimination. But OFCCP refuses to recognize Supreme Court decisions defining standards to be utilized in determining the existence of discrimination. OFCCP contends such decisions, which generally interpret Title VII, are not applicable to its administration of the Executive Order program. In reality, OFCCP adopts those decisions it considers "helpful" to its mission, while rejecting "unfavorable" decisions. Thus government contractors are subjected to penalties based on OFCCP's often vacillating views of its mandate, without the safeguards of judical decisions or procedural standards defining the limits of liability for discrimination.

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[1] See attached portions from Brief of Defendant Harris Trust and Savings Bank and the Brief Amicus Curiae of the Equal Employment Advisory Council in United States Department of the Treasury v. Harris Trust and Savings Bank at Appendix II.

OFCCP's emphasis upon remedies normally provided by judicial decrees duplicates the efforts of the EEOC and hundreds of local Fair Employment agencies. This multiplicity of parallel enforcement activities increases the cost of doing business with the Federal government unnecessarily. At the same time this duplicating emphasis on rectifying past discrimination detracts from special efforts to open additional opportunities to the protected classes. OFCCP authority should complement other enforcement efforts rather than duplicate them. That authority should be limited to debarment when efforts to enhance available opportunities for the protected classes have not been made.

B. COMPLIANCE WITH EXECUTIVE ORDER 11246 HAS BECOME A BURDENSOME, HARASSING "NUMBERS GAME"

The imposition by OFCCP of complex and sometimes absurd requirements for the development of specific numerical goals, and its reviews of contractor compliance, are the focus of most government contractors resentment and frustration. The Agency's Equal Opportunity Specialists are notorious for their prosecutorial attitudes and unwillingness to allow for any flexibility even when the facts show a compelling need for departing from rigid, mathematical formulas. This approach is encountered with such regularity that federal contractors have come to believe that the OFCCP has instructed each of its investigators: (a) to assume every company to be discriminating, and (b) not to let the contractor dispel that image by confusing the investigator with the facts.

Abuses in the compliance process abound, and are a sad indication of how far from the concept of Affirmative Action we have strayed. A real opportunity for improving employment opportunities for women and minorities has been lost through inept and arbitrary administration. OFCCP effort is directed toward finding contractors guilty of violating its regulations. As a result, contractor effort is directed toward emerging from reviews as little scathed as possible. Under such inflexible and seemingly hostile requirements the "affirmative" has been lost.

CACI does not believe the whole of American business to be so ill-intentioned and so recalcitrant as to call for the tactics OFCCP has adopted. The OFCCP is training a generation of businesses in everything about how to comply with the minutiae of repressive regulation and nothing about the social good that was affirmative action's aim.

II. ALTERNATIVE APPROACHES TO ACHIEVING EXECUTIVE ORDER 11246 OBJECTIVES

CACI recommends putting the "Affirmative" back into the concept of Affirmative Action. Equal employment law enforcement -- the punitive side of the country's equal employment policy -- should be left to the EEOC, the various state and local agencies which have "deferral status," and the private litigants contemplated as "private attorneys general" by the Civil Rights Act of 1964.

A new Executive Order and the staff chosen to implement it should aim at being constructive, educational, helpful -- the affirmative concomitant of national equal employment policy.

Its implementation should be selective -- concentrating on major government contractors whose employment statistics evidence a substantial shortfall in minority and/or female employment. The Executive Branch should offer such employers aid, counsel, and affirmative suggestions for means by which progress toward achieveing equal employment opportunity could be made. Such assistance should then be followed up by periodic progress audits. If progress in the key segments of their work force (Officials and Managers, Professionals, Technicians, and the other categories designated in the EEO-1 reports) is made, then further counseling should be voluntary with the contractor. If progress is not shown, then inquiry should be made as to whether the affirmative suggestions previously made have been followed. If they have been followed, albeit without success, it should be the task of the administrator to provide further suggestions and help in achieving progress. Only if the suggestions have not been followed should there be reason to question whether the contractor should continue to be qualified to do business with the government.

Thus, affirmative action can be restored by emphasizing the positive and providing help and assistance to contractors on the assumption that they want to provide equal opportunity -- not on what seems to be the current assumption, i.e., that all government contractors want to subvert equal employment policy.

Some progress toward a more rational and constructive program could also be made by regulatory reform. Reform should be directed at developing a less specific, more open-minded approach, allowing for more flexibility in the compliance process. Among specific reforms CACI urges are the following:

A. ELIMINATION OF BACK-PAY REQUIREMENTS

Full relief, including back-pay and reinstatement, is available to victims of discrimination proven under Title VII. The prosecutorial and punitive stance involved in assessing back-pay is counterproductive to what should be OFCCP's purpose of encouraging affirmative efforts to increase employment opportunities. Accordingly, we recommend revision of the regulations to eliminate any assessment of back-pay.

B. ELIMINATION OF DUPLICATIVE COMPLAINT-PROCESSING ACTIVITY

The area of complaint-processing is truly one in which duplication of effort has been rampant, in spite of "OFCCP-EEOC Memoranda of Understanding" to the contrary. The Equal Employment Opportunity Commission should be acknowledged as the agency primarily responsible for discrimination complaint processing, as well as for seeking relief for proven victims of discrimination. OFCCP should only process complaints for which it is the sole source of relief. Such clear-cut role assignment can only aid OFCCP's return to its original purpose and will result in two agencies whose efforts are complementary rather than duplicative. The fact that contractors' actions will be judged by a consistent standard, that of Title VII, will also go far to alleviate businesses' current confusion and "double jeopardy."

C. ELIMINATION OF BURDENSOME AND COUNTERPRODUCTIVE REQUIREMENTS

Without cataloging all of the individual regulations which are burdensome, or counterproductive, CACI supports the following reform or relief:

1. A simplification of Affirmative Action Plan requirements; current AAP requirements include a work force analysis by "job groups," an eight-factor availability analysis; a utilization analyis, goal setting by job group and a number of other analyses. All of this strongly suggests a thinly disguised quota system. Affirmative Action Plans should, instead, be oriented toward progress in achieving improvements in minority and female representation in each of the EEO-1 categories. This can be done without the complex and arbitrary formulas which now impose a heavy and well-nigh incomprehensible bureaucratic burden on contractors.

2. An increase in the threshold for Affirmative Action Plan preparation; the current $50,000 and 50-employee threshold subjects many small contractors with little access to expertise and with limited impact on the labor force, to an onerous paperwork burden.

3. A less expansive definition of government contractor; under the current OFCCP definitions, practically any business can be a government contractor. Executive Order obligations are legally justifiable as part of a government procurement program; asserted coverage of businesses with only the most ephemeral relationship to a government contract should end. OFCCP's position that all of a contractor's facilities, subsidiaries, parent companies and their facilities, including those unrelated to any government contract, are subject to the Executive Order requirements should be revised.

4. An elimination of, or increase in, the threshold, for pre-award compliance reviews. Such reviews, consume an inordinate amount of OFCCP resources, which could be better utilized. If pre-award reviews are to be retained at all, then such reviews should be limited to very large contracts and contractors, where a genuinely significant impact on government procurement policies can justify the burden on the regulated industry.

5. The elimination of declarations of underutilization; contractors should not be forced, by virtue of doing business with the government, to publish statements increasing their exposure and liability under Title VII. Underutilization, in any event, should be a concept which applies only when the disparity between the number of minorities and females in the category and "availability" is statistically and practically significant. (See Firestone Tire and Rubber Co. v. Marshall, 507 F. Supp. 1330 (E.D. Tex. 1981), attached.)

(Note: In the interest of economy, the appendix to this statement was retained in the files of the committee because of its' voluminous content.)

STATEMENT BY J. W. PELTASON, PRESIDENT, AMERICAN COUNCIL ON EDUCATION ON ENFORCEMENT OF EXECUTIVE ORDER 11246

DRAFT

As President of the American Council on Education (ACE), the major coordinating body in higher education, I am pleased to submit this statement for inclusion in the record of the oversight hearings on activities of the Office of Federal Contract Compliance Programs (OFCCP) currently being conducted by the Senate Committee on Labor and Human Resources.

At the outset, it is important to state that most, if not all, higher education contractors recognize the positive contribution sensible affirmative action programs can make to our efforts to achieve equal opportunity in employment for women and minorities at institutions of postsecondary education. The questions we raise here primarily concern not the existence of Executive Order 11246 but the way it has been enforced against college and university contractors by the Department of Health, Education, and Welfare and now by the Department of Labor.

None of these questions is new. Most were raised in testimony given before the Department of Labor in 1975 and have been repeated on many occasions since. A number were addressed in comments on pending OFCCP rule filed by ACE with the Department of Labor in March 1980. Most recently, these issues were raised again in the Regulatory Reform Agenda submitted by the ACE to Vice President Bush on May 1, 1981. (A copy of that submission is attached to this statement.)

Testifying before the Labor Department in 1975, President William G. Bowen of Princeton University said:

> Broadly speaking, the concerns which colleges and universities have had with governmental

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affirmative aciton programs to date can be divided into two categories:

1 Concerns over certain administrative requirements and sanctions, including the nature and amount of data required; the slowness of response to plans submitted; the sense that some of those who have been involved in administering the program have not been sufficiently knowledgeable about higher education; the lack, most noticeably this June, of due process in attempting to determine compliance; and the nature of the only sanction available in the event of a finding of non-compliance--termination of federal support for important programs of education and research.

2 Concerns having to do with the basic approach being forwarded with regard to faculty staffing, including the meaning and measurement of "availability" and "underutilization;" the nature and definition of goals and timetables; the concept of "ultimate goals;" the definition and determination of what constitutes "good faith efforts;" and the emphasis to be given to statistical tests of one kind or another.

These two basic concerns remain the overriding enforcement issues identified by college and university contractors today. Never ending compliance reviews, inconsistent agency requirements on a region-to-region basis, duplicative and unnecessarily detailed requests for data, and unjustified invasions of academic freedom and the peer review process continue to characterize much of the OFCCP

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enforcement effort. Inadequate training of personnel charged with investigating higher education contractors remains a major impediment to effective Executive Order enforcement.

These problems are magnified by an attitude that permeates the agency and contributes to the adversarial nature of current interactions between federal investigators and higher education contractors. All contractors are presumed guilty of Executive Order violations until they prove themselves innocent. This is not just an unfortunate attitude held by some field personnel. It is an attitude embodied in the very rules under which the OFCCP operates.

An example of the "codification" of this presumption is that there is no provision in the Executive Order rules governing compliance reviews and complaint investigations that informs agency employees of the proper actions to be taken when they do not find violations of the Executive Order requirements. The obvious implication is that there is no need for such a provision because OFCCP enforcement staff will always find violations.

In our view the Executive Order enforcement program must be perceived to be fair to be effective. The presumption of guilt embodied in the OFCCP rules and accepted by the agency's staff diminishes the effectiveness of the agency's efforts to obtain voluntary compliance with the requirements of the Executive Order. If a contractor is never rewarded for good faith compliance efforts, there is no incentive for the contractor ever to try voluntarily to comply.

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Examples of enforcement problems that are unique to our contractor group, but exemplify the more general problem of inconsistency of OFCCP's enforcement actions from region to region (as well as the problems we have had getting recognition of difficulties inherent in applying the traditional industrial model to higher education), include the recent problems we have had gaining nationwide acceptance by OFCCP investigators of the OFCCP approved "industry specific" format for developing college and university affirmative action plans, and the problems we are now experiencing in obtaining nationwide implementation of former Secretary Marshall's order concerning agency handling of confidential faculty peer review files.

As several college attorneys and ACE's assistant general counsel pointed out to Weldon Rougeau in a March 1980 letter addressed to him as Director of OFCCP, there are important and convincing reasons for the continued acceptance of the "industry specific" Format for Development of an Affirmative Action Plan by Institutions of Higher Education that was developed under the auspices of OFCCP in 1975. Higher education institutions vary significantly from other contractors in that they are not for profit entities that operate in most cases on a shared governance theory. They produce a "product" that can only be evaluated in qualitative terms, and the conditions of employment of their most important "workers"--their faculty--are unique. The 1975 Format, while admittedly not perfect, recognized these important differences in specifying how a university affirmative action plan could be developed.

Despite the fact OFCCP was directly involved in writing the 1975 Format, after Executive Order enforcement authority was

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consolidated in OFCCP in 1978 a number of OFCCP's regional and national office staff refused to accept university affirmative action plans written in conformance with the 1975 Format. These officials asserted only plans written strictly in conformity with the technical requirements of Revised Order 4 as described in the OFCCP Compliance Manual were satisfactory under Executive Order 11246.

After discussions with senior OFCCP staff in spring 1980, it was agreed that, although OFCCP planned to revise the 1975 Format, it would continue to accept plans written on the existing Format until such revisions were completed. This should have eliminated any confusion in the regions regarding the status of the Format. However, ACE recently learned that just this spring a major southern university was required by a regional OFCCP civil rights specialist to revise its affirmative action plan (developed in compliance with the 1975 Format) to reflect the regional official's definition of an acceptable affirmative action plan. The regional official's only previous experience was with traditional industry contractors. He refused to accept the validity of the 1975 Format. The unnecessary revisions he required the university to make cost almost $45,000.

We are now also experiencing regional differences in the manner in which OFCCP compliance officers handle questions regarding treatment of confidential faculty peer review files gathered in the course of Executive Order compliance reviews. University contractors have a legitimate concern about the availability of such records to the public at large under the terms of the federal Freedom of Information Act. A carefully negotiated procedure contained

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in a consent order entered by then Secretary Marshall against the University of California at Berkeley mitigates to some extent these concerns. Although the procedure set forth in the consent order now represents standard operating procedure in a number of regions, some regional officials have rejected conciliation agreements that contain verbatim the language of the Berkeley order. This is the case despite the existence of an unrescinded directive by former Secretary Marshall to the Assistant Regional Administrators that instructs them to protect to the greatest extent possible the privacy of these important records.

These two examples are only representative of the kinds of enforcement difficulties higher education contractors have experienced over the years. What is most troubling about these problems and others we have identified is the fact that our repeated efforts to remedy them have been notoriously unsuccessful. We have volunteered to assist in staff training but have never been invited to do so. We have made line by line comments on proposed rules that have been largely ignored. It remains, however, our fervent hope that these vexing enforcement problems can be solved so that we may direct our energies and our resources from these problems to the goal the Executive Order was written to underscore--achieving real equality of opportunity for all employees and applicants at institutions in our contractor group.

"REGULATORY REFORM AGENDA"

I **Source of Rule:**

Department of Labor

Office of Federal Contract Compliance Programs

II **Citation:**

Executive Order 11246
Section 503 of the Rehabilitation Act of 1973
Section 402 of the Viet Nam Era Veterans Readjustment Act
Proposed Rules, 45 Fed. Reg. 86228 (December 30, 1980)

III **Description of Problems:**

There are a number of proposed changes to the equal opportunity regulations governing federal contractors that raise significant problems for university contractors. Following is a short summary of a number of the more significant issues identified and explained more fully in the attached comments filed March 24, 1980:

1) The proposals raise doubts about the continued validity of the 1975 Higher Education Format. It is important that this "industry specific" format for university affirmative action programs be preserved.

2) The proposals set new, more flexible standards for deciding when OFCCP should conduct pre-award compliance reviews. These more flexible standards may not be applied to university contractors absent a modification in the court order in WEAL v. Califano, et al.

3) The proposals are replete with language that suggests that all federal contractors are presumed by OFCCP to be guilty of discrimination.

IV **Recommended Solution(s):**

1) OFCCP officials should be directed to affirm the continued validity of the 1975 Higher Education Format. If modifications in the Format are necessary, they should be made only after full consultation with representatives of the higher education community.

2) The Department of Labor should ask Judge Pratt for appropriate modifications in the WEAL order.

3) The language of the proposals should be modified as suggested in the attached comments.

I **Originator:**

R. Claire Guthrie
Assistant General Counsel
American Council on Education
One Dupont Circle
Washington, D.C. 20036
(202) 833-4741

Attachment

(Note: In the interest of economy, the attachment referred to was retained in the files of the committee where it may be researched upon request.)

PORTIONS OF THE CORRESPONDENCE BETWEEN NATIONAL BANK OF GREENWOOD AND THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

RICHARD G. LUGAR
INDIANA

5107 DIRKSEN OFFICE BUILDING
WASHINGTON, D.C. 20510

INDIANA OFFICE:
46 EAST OHIO STREET, ROOM 447
INDIANAPOLIS, INDIANA 46204

United States Senate
WASHINGTON, D.C. 20510

COMMITTEES:
AGRICULTURE, NUTRITION, AND FORESTRY
BANKING, HOUSING, AND URBAN AFFAIRS
FOREIGN RELATIONS
SELECT COMMITTEE ON INTELLIGENCE

June 22, 1981

Mr. Jay F. Sauls
Assistant Regional Administrator
Office of Federal Contract Compliance Programs
Employment Standards Administration, Region V
U.S. Department of Labor
230 South Dearborn Street- Room 1600
Chicago, Illinois 60604

Dear Mr. Sauls:

I am in receipt of your June 15th correspondence in which you replied to Senator Lugar's request in which he asked for an explanation for the OFFCP extensive investigation and review of the National Bank of Greenwood's AAP submission.

His concern focused on the seemingly extraordinary cost and length of delay for the Bank's AAP approval.

Your letter failed to discuss these concerns of the Senator. Thus, I ask that you review Senator Lugar's original request and respond accordingly.

Thank you for your attention to this matter.

Sincerely,

Paul D. Gresk

Paul D. Gresk
Public Affairs Assistant

PDG/dk
cc: U.S. Senator Richard Lugar
Mr. Gregory Utken
Mr. Robert Hill, National Bank of Greenwood

U.S. Department of Labor

Employment Standards Administration
Office of Federal Contract
Compliance Programs

230 S. Dearborn Street - Room 1600
Chicago, IL 60604

Reply to the Attention of:

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

JUN 15 1981

Honorable Richard G. Lugar
Member, United States Senate
46 East Ohio Street, Room 447
Indianapolis, IN 46204

ATTN: Paul D. Gresk

Dear Senator Lugar:

This is in response to your inquiry concerning our review at the National Bank of Greenwood.

The Indianapolis Southwest Area Office is in the process of reviewing the current Affirmative Action Plan (AAP) and the Bank's implementation of their previous AAP. Since the review is still open there is no final determination of their compliance status at this point. As soon as the records necessary for our determination have been submitted and reviewed, the Bank will receive a letter outlining their status and whether any corrective actions might be required.

Thank you for your interest in this matter.

Sincerely,

JAY F. SAULS
Assistant Regional Administrator
Office of Federal Contract Compliance Programs
Employment Standards Administration, Region V
United States Department of Labor

COPY

January 16, 1981

Mr. James R. Turner, Area Director
Office of Federal Contract Compliance
Program
575 North Pennsylvania Street
Indianapolis, Indiana 46204

Dear Mr. Turner:

The National Bank of Greenwood has shared with me its experiences with the Office of Federal Contract Compliance Program (OFCCP) in its attempt to gain approval for its Affirmative Action Plan (AAP).

I am deeply interested in this matter because the information which I received from the Bank of Greenwood, a small business, shows it innocent of any past or present discrimination and that the Bank has spent over $75,000 in its attempt to comply with the many information requests and orders from OFCCP.

This information alone does not cause me concern, but I would appreciate receiving from you a reasonable justification for the investigation, its length and the reasons OFCCP's requested data and employment information at the cost cited. Additionally, I would appreciate knowing the status of the Bank's Affirmative Action Plan and what future actions OFCCP anticipates will be necessary before approval of the AAP will be rendered.

I appreciate your consideration and attention to this matter and I look forward to gaining a better understanding of this case.

Sincerely,

Richard G. Lugar
United States Senator

RGL/pgd

NATIONAL BANK
OF GREENWOOD

P O BOX NBG • GREENWOOD, INDIANA 46142

May 8, 1981

Senator Orrin G. Hatch
Chairman, Senate Labor Committee
Room 411, Russell Office Building
Washington, D.C. 20510

Dear Senator Hatch:

As Vice President and Personnel Administrator of the National Bank of Greenwood, Greenwood, Indiana, I feel the time has arrived to write you concerning the Department of Labor's "Office of Federal Contract Compliance Program".

The National Bank of Greenwood is a small business serving the community of Greenwood, Indiana, population of 19,000 and located south of Indianapolis, Indiana.

In March of 1979, the bank received its first contact from OFCCP, stating that the National Bank of Greenwood had been selected for a compliance review. As of today, May 8, 1981, this bank is still burdened with constant, and seemingly never ending requests for vast amounts of information. Our affirmative action program has not yet been approved, yet we are in our third year of review.

Attached to this letter are two enclosures which outline our concerns including a chronology of events since March 29, 1979. These listings should clearly identify why the management of the National Bank of Greenwood is concerned over this compliance review.

Senator Richard G. Lugar was contacted in January of this year, at which time we voiced the same concern outlined here. The Senator wrote to the director of the local OFCCP offices on January 16, 1981, asking for an explanation of this situation, and as of this writing the Senator has not received a reply to his correspondence.

In essence, we believe that OFCCP's regulations are extremely burdensome, costly, and difficult if not impossible to comply with. For example, due to its geographic location the bank will have great difficulty in meeting the goals and timetables outlined in this affirmative action program. The eight factor availability analysis and the OFCCP's questionable weighting system of these factors makes a workable and attainable program next to impossible to attain. Additionally, over the two year review period different OFCCP specialists have demanded alternative statistics, forms, and information. In other words, it is difficult to know just what is expected of us.

The management of the National Bank of Greenwood has been following your comments concerning OFCCP, and agree with your suggestions as they relate to cost, paperwork, and cooperation rather than confrontation. Business needs a positive and workable program to enhance the principles of equal employment opportunity, not an adversary relationship with the government agency which was created to accomplish the same ideals.

In summary, the National Bank of Greenwood is asking you to review our concerns and, if possible, forward our enclosed information to the Vice President's Task Force on Regulatory Relief. We would be happy to supply these concerns to any person or agency that you would recommend.

Thank you for your attention to this matter of concern, not only to our bank, but the business community in general. We look forward to your comments and suggestions.

Sincerely,

Wilson A. Hurrell
Vice President
Personnel Administrator

WAH:sh
Enclosures

(Note: Due to the voluminous content of the enclosures submitted by the National Bank of Greenwood the material was retained in the files of the committee in the interest of economy.)

NBG NATIONAL BANK
OF GREENWOOD

P. O. BOX NBG • GREENWOOD, INDIANA 46142

June 12, 1981

Robert P. Hunter
Chief Counsel & Staff Director
Senate Committee on Labor & Human Resources
4230 Dirkson Senate Office Bldg.
Washington, D.C. 20510

Dear Mr. Hunter:

As Vice President and Personnel Administrator of the National Bank of Greenwood, Greenwood, Indiana, I feel the time has arrived to write you concerning the Department of Labor's "Office of Federal Contract Compliance Program".

On May 8, 1981, I wrote Senator Orrin G. Hatch detailing the concerns and problems that the National Bank of Greenwood has been encountering since March, 1979. This letter and enclosures state the same problems outlined in our letter to Senator Hatch.

The National Bank of Greenwood is a small business serving the community of Greenwood, Indiana, population of 19,000 and located south of Indianapolis, Indiana.

In March of 1979, the bank received its first contact from OFCCP, stating that the National Bank of Greenwood had been selected for a compliance review. As of today, June 12, 1981, this bank is still burdened with constant, and seemingly never ending requests for vast amounts of information. Our affirmative action program has not yet been approved, yet we are in our third year of review.

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Thank you for your attention to this matter of concern, not only to our bank, but the business community in general. We look forward to your comments and suggestions.

Sincerely,

Wilson A. Hurrell
Vice President-Personnel Administrator

WAH:cg
enclosures

January 15, 1981

CONCERNS OF THE NATIONAL BANK OF GREENWOOD REGARDING THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS INVESTIGATION

Since March of 1979, NBG has been undergoing a standard review and investigation with respect to their equal employment opportunity policies and affirmative action programs. They were apparently selected at random for the investigation since NBG is not aware that there has ever been any employment discrimination charge filed against it. NBG would like to bring this matter to the Senator's attention because it feels that the investigation has gotten to the point of harassment and to point out some problems it has experienced as a small employer subject to the OFCCP regulations.

NBG is a relatively small employer. It employs anywhere between 120 to 150 individuals and is a firm believer in equal employment opportunity laws. It has become thoroughly frustrated with its experience with the OFCCP as more fully explained below.

Since September of 1979, NBG has been seeking the OFCCP's approval of the Bank's Affirmative Action Program (AAP). Several times since then the OFCCP has represented that if certain information was submitted the program would be approved. In June of 1979, the OFCCP sent a letter to the Bank stating that its AAP was not in compliance and issued a show cause notice listing one-half of a page of deficiencies in the AAP. In July of 1979, NBG submitted information to meet the listed deficiencies in the program. In August of 1979, the OFCCP finished reviewing the material sent and indicated that there were still some areas of concern before the AAP could be approved. During this time period, OFCCP representatives had visited the Bank and indicated that the AAP could be approved after submission of some statistical analysis. However, on September 24, 1979, these same representatives visited the Bank and said that the AAP could not be approved because there were several other problems. In October, 1979, the Bank went ahead and submitted its statistical analysis as required by the OFCCP. Additionally, it submitted a job code listing in the format requested by the OFCCP representatives.

In November of 1979, the OFCCP notified the Bank that the AAP was not in compliance despite the fact the Bank had submitted information per the OFCCP's request. The OFCCP then issued a new list of deficiencies covering 3-1/2 pages. In December of 1979, the Bank forwarded voluminous modifications of its AAP again complying with the OFCCP's deficiency list. At the time of submitting this information the Bank again requested approval of its AAP as had previously been represented.

In June of 1980, six months later, the OFCCP, rather than sending its approval, sent a letter announcing that additional voluminous information must be submitted concerning current employees of the Bank. The Bank complied with this request late in June of 1980. Rather than get an approval of its AAP as it expected, on July 22, 1980, it received a letter from OFCCP announcing that it would be conducting an on-site compliance review of the Bank. Between July 24 and July 29, 1980, an on-site review was conducted by a different representative of the OFCCP. During this review she was permitted to review payroll records, personnel records, and interview both employees and supervisors. On August 5, 1980, the OFCCP sent yet another letter to NBG, this time listing four pages of deficiencies with the AAP. On August 14, 1980, the OFCCP sent a follow-up letter requesting yet additional information on former and present employees. Late in August, the Bank submitted a revised AAP to the OFCCP again responding to the deficiencies listed in the August 5 letter. Instead of receiving the expected approval, the OFCCP sent NBG a letter that the AAP was not acceptable and submitted three more pages of requested changes.

On October 9, 1980, NBG submitted the requested changes per the OFCCP's 9/25/80 letter. However, on November 6, 1980, the Bank received a letter from OFCCP saying that the AAP was not acceptable. On November 10, the Bank sent OFCCP yet another modification of its AAP. It had been represented to the Bank that with the submission of this material it would be just "a matter of days" before the AAP would be approved. Incredibly, on November 17, 1980, the OFCCP sent a letter to the Bank stating that the program would not be approved because there were further deficiencies. Late in November, the OFCCP sent two letters to the Bank, the first of which details on six pages additional information requested concerning former and present employees and a subsequent letter requesting further information which turned out to be the largest informational request made to the Bank since the March, 1979 commencement of the investigation.

On December 17, 1980, the Bank once again met the OFCCP's demands and forwarded the additional requested information. At the same time it again requested that its AAP be approved as had been represented to the Bank several times in the past. To date the Bank has not yet received approval of its AAP.

The Bank has further been frustrated by the apparent ineptitude or bumbling of the OFCCP representatives handling the investigation. A prime example of this has to do with the statistical analysis that was required to be a part of the AAP. Early in September of 1979, the OFCCP gave the Bank a set of forms to be used to complete the required statistical analysis. Days later, a Bank representative went to the OFCCP office for assistance on the matter and was told not to use those forms at all but to use a different set of forms, which were given to him. Within an hour, the OFCCP instructed him not to use the second set of forms but gave him yet a third set of forms. The Bank completed the forms per the OFCCP directive. It also submitted a listing of jobs in a format requested by the OFCCP representatives.

Six months later when the investigation was turned over to a different representative of the OFCCP, two of the primary deficiencies she found were that the Bank's statistical analysis and listing of jobs were not in the proper format. The Bank could not believe what it was hearing since the format was exactly that forced upon it by the previous OFCCP representatives. Now it was unacceptable and had to be redone which would entail hours and hours of work. What was even more disturbing is that the format followed was based on a written document submitted to the Bank by the OFCCP. When this was pointed out the OFCCP then took the position that the document was only a draft but not to be relied upon.

The Bank has also become concerned about the seemingly never-ending request for additional information which has resulted in the Bank supplying to the OFCCP literally a complete job history for each of its employees including submitting their applications, their job history, their salary history, their promotion history, etc. About the only thing that the OFCCP has not requested is the hat and shoe size of the Bank's employees.

While the Bank understands the reasonable interest of the federal government in reviewing affirmative action programs, it does not understand why an employer its size must be subjected to numerous, voluminous, and burdensome demands which have required the expenditure of hundreds of man-hours and thousands of dollars. This is particularly disturbing to the Bank since there has never been an employment discrimination charge ever filed against it. Furthermore, the OFCCP has forced the Bank to submit to scrutinization of each and every employment decision ever made on each of its employees. The Bank has supplied all this information and it has never been notified that any of its practices or actions with respect to an employee were even considered to be discriminatory. In fact, after the July, 1980 on-site review the OFCCP investigator commended the Bank for its affirmative action efforts.

Throughout all this the Bank has been very cooperative, acted in good faith and literally jumped through every hoop the OFCCP has raised for it. Each month it keeps expecting its AAP will be approved, but instead, receives only greater lists of deficiencies or informational requests that require responses. Each time the requests become larger. Despite the fact that several times it has been represented that the program would be approved shortly, the OFCCP comes up with more questions.

The Bank is concerned that the Senator realize what is happening "out in the field", so to speak, to small employers subject to the jurisdiction of this agency. As Mr. Hurrell expressed in his letter to Paul Gresk of December 5, 1980, the Bank estimates that it has spent $75,000 and untold administrative and labor hours trying to comply with what has become excessive and burdensome requests of the OFCCP. While such in-depth analysis of employers like General Motors or ITT might be justified, the Bank wonders if it's really necessary for it to be put through this "wringer". Is our federal government justified in requiring a small employer like NBG to spend that type of money and manpower to meet administrative regulations when the Bank has never been charged with employment discrimination nor has there ever been any evidence that any of its employment actions have been discriminatory? The OFCCP investigation of NBG appears to be a classic example of swatting a nat with a sledge hammer.

CHRONOLOGY OF CORRESPONDENCE AND EVENTS RE: NBG

1. March 29, 1979

   OFCCP letter to NBG notifying it that the Bank has been selected for compliance review, listing twelve types of records OFCCP will want to review.

2. April/May, 1979

   OFCCP representatives Stafford and Malott visit NBG. Review records, make informational requests.

3. June 21, 1979

   OFCCP letter to NBG stating that material submitted not in compliance--show cause notice issued administrative action threatened. Lists one half page of deficiencies in affirmative action program.

4. June 26, 1979

   OFCCP sends NBG another show cause letter, covering same thing as 6/21/79 letter, but signed by different OFCCP representative.

5. July 24, 1979

   NBG submits information in an attempt to comply with 6/79 show cause deficiencies.

6. August 14, 1979

   OFCCP letter to NBG stating that it has completed review of NBG submissions pursuant to the show cause letter. States there are still some areas of concern and announces plans to conduct on-site investigation including reviews of files and records sometime in August.

7. September 24, 1979

NBG meets with OFCCP representative Stafford and Malott. They make informational requests.

8. September 26, 1979

NBG's attorney sends letter to OFCCP (Mr. Stafford) submitting requested information and noting confusion in different instructions given by OFCCP on statistical analysis. Also expresses surprise that affirmative action program would not be approved due to several other problems. Stafford had represented that program would be approved after submission of statistical analysis.

9. October 1, 1979

NBG attorney letter to OFCCP submitting modified statistical calculations and complying with OFCCP requests on certain weighting factors. Also enclosed is job code listing per request. Numerous hours spent in preparing data, all information prepared in accordance with Stafford and Malott instructions.

10. November 26, 1979

OFCCP letter to NBG finding that NBG affirmative action program is not in compliance despite the fact it has submitted information per their request--amended show cause order issued with new 3-1/2 page list of deficiencies. Original letter of 6/21/79 lists only 1/2 page of deficiencies.

11. November 27, 1979

OFCCP letter to NBG from Stafford confirming that NBG is observing the factor weighing system but finding other alleged deficiencies in NBG's application of the system.

12. November 30, 1979

OFCCP letter to NBG notifying it that affirmative action programs for handicapped and Vietnam veterans are unacceptable, requests corrections.

13. December 28, 1979

NBG attorney letter to OFCCP with voluminous modifications of affirmative action program per OFCCP's request in 11/26/79 letter. NBG asks for approval of AAP as previously indicated.

14. January 3, 1980

NBG attorney letter to OFCCP complying with deficiency notice of 11/30/79 re: handicap and veteran AAP.

15. January 31, 1980

OFCCP letter acknowledging NBG letter of December 28, 1979 stating that materials will be reviewed.

16. June 3, 1980

Six (6) months after NBG submits information in 12/18/79 letter, OFCCP sends letter announcing that additional information must be submitted with respect to current employees of the Bank including race, sex, initial hire date, position and salary, qualifications at the time of hire, current position and salary, and training provided. Letter requests information be submitted within two weeks and announces that Mary Till has now been assigned to the case.

17. June 23, 1980

NBG attorney letter to Till at OFCCP submitting the requested information on all current employees.

18. July 22, 1980

OFCCP letter to NBG announcing on-site compliance review for two or three days. Enclosing list of fourteen types of records to be reviewed by OFCCP.

19. July 24-29, 1980

On-site review conducted. Mary Till allowed to review payroll and personal records and interview employees and supervisors. During review, Till informs NBG that the statistical analysis and job code listing are done incorrectly. NBG informs Till that her predecessor Stafford and Malott had instructed NBG to perform analysis in that fashion. She instructs us to change it.

20. August 5, 1980

OFCCP letter to NBG with four-page listing of deficiencies to be corrected. Deficiencies different than those listed in previous letters.

21. August 14, 1980

OFCCP letter to NBG with additional informational request on former and present employees.

22. August 29, 1980

NBG attorney letter to OFCCP enclosing revised affirmative action program.

23. September 25, 1980

OFCCP sends NBG letter saying AAP not acceptable, submits three more pages of requested changes.

24. October 9, 1980

NBG submits requested AAP changes per OFCCP 9/25/80 letter. Two days before, Till changes statistical request, mid-stream making much of submitted material which took numerous hours to complete totally meaningless.

25. November 6, 1980

OFCCP says NBG statistical analysis not satisfactory.

26. November 10, 1980

NBG attorney letter to OFCCP submitting yet another statistical analysis, following OFCCP directives and confirming statement by Till to NBG that with submission of these figures AAP would be approved.

27. November 17, 1980

OFCCP letter to NBG stating that program would not be approved finding further deficiencies and notifying NBG of additional data needed and records to be reviewed.

28. November 21, 1980

OFCCP letter to NBG with detailed six- page listing of additional information requested concerning former and present employees.

29. November 26, 1980

OFCCP letter to NBG requesting further information. Largest informational request to date.

30. December 17, 1980

NBG attorney letter to OFCCP enclosing additional request information and requesting once again that AAP be approved as represented several times in past.

31. April 6, 1981

OCCCP sends another letter to NBG asking for yet more information in order for OFCCP to continue with their review. This letter was signed by another person unfamiliar to NBG.

NEWS

The Prudential Insurance Company of America
Public Relations
Newark, New Jersey 07101
Tel. 201-877-7307

FOR IMMEDIATE RELEASE

WASHINGTON, D.C, July 29 -- Calling The Prudential Insurance Company's experiences last year with the United States Department of Labor "a graphic illustration of overreaction and irresponsibility in the regulatory process," Company Chairman and Chief Executive Officer Robert A. Beck spoke on affirmative action and equal employment opportunity before the Senate Labor and Human Resources Committee today.

"Enforcement is marked by an adversarial atmosphere of threat and intimidation," he said, "and the Agency seems to operate on the presumption that constant and rigorous regulation of a few large companies will cause the remainder of the contractor community to fall into line."

Beck notes that those employers with excellent records in affirmative action, such as General Electric, Sears, AT&T, General Motors and Prudential "are, ironically, the targets of continuing compliance enforcement. Yet, each year fewer than 1% of all Federal contractors are reviewed and often these are the same companies reviewed in previous years," he continued.

In his statement, Beck called for government regulators to "begin viewing their roles differently; and for business to recognize and cooperate with the legitimate interests of government. He urged consideration of new and innovative approaches to affirmative action which incorporate employer incentives for voluntary compliance.

"Prudential has invested more than $1.5 million in a single compliance review which began in 1979," Beck said. "In fiscal year 1980, the Office of Federal Contract Compliance Programs spent almost $32 million in compliance

-more-

Prudential

reviews in which there was no finding of discrimination. Add to that another $40 million in contractor costs for reviews in which there was no finding of discrimination. Think what $70 million would do if put to work productively."

Reminding the Committee that social responsibility has been emphasized by American industry in the past ten years, Beck pointed out that a "more direct focus on affirmative action is a natural extension of that philosophy.

"With the enlightened guidance of government, we can mobilize the business community, labor and private interest groups to address these problems. Let us marshall our resources and invest them wisely in programs which will expedite the training and placement of minorities and women in marketable skills and jobs."

During his testimony, Beck recounted the Labor Department's action against Prudential last year, at which time the Company was threatened with debarment from federal contracts. Among the insurance activities which would have been affected, he said, were the renegotiation of group insurance contracts for more than 200,000 federal employees, the life insurance program for 3.5 million men and women in the armed services and Medicare benefits for two million recipients in New Jersey, North Carolina and Georgia. The jobs of more than 1,300 Prudential employees, many of whom are minorities and women, would have been jeopardized by this action.

"The Office of Federal Contract Compliance Programs was on a fishing expedition," Beck stated. "They wanted more information than they needed...and much of what they sought was of a confidential nature."

Prudential employs 69,000 men and women in more than 1,500 administrative, claim, investment and sales offices. The Company, which has affirmative action programs covering each office, has been the subject of Labor Department compliance

-more-reviews since the mid-1960's and all reviews have been satisfactorily concluded.

"That fact is evidence not only of our commitment to the objectives of the program, but also the spirit with which we have approached the Agency's obligation to monitor our progress," Beck said.

Prudential and the Department of Labor established a conciliation agreement in 1976 which covered changes in the Company's affirmative action programs and resolved all issues relating to affirmative action prior to 1976. Beck expressed his near disbelief when in 1979 he was told by the Labor Department that a compliance review of facilities in New Jersey and metropolitan New York would be conducted without regard to the terms of the conciliation agreement.

"In the blink of an eye, they had repudiated their own agreement!" Beck said. "In the past two years, detailed investigations of virtually every employment practice and personnel practice have been pursued by the Agency with suspicion and doubt."

During this time, Prudential offered to provide the Office of Federal Contract Compliance Programs with computer tapes requested for the review. Confidential information, which would compromise the privacy rights of employees, would be deleted.

"The Agency said that offer was unacceptable and indicated enforcement proceedings would be commenced," Beck said, referring to last summer's debarment action.

In contesting this action, which Prudential felt was "arbitrary and capricious," the Company sought relief in the U.S. District Court. A subsequent court-assisted resolution of the case preserved the privacy rights of the Prudential employees, and forced the Labor Department to abide by the terms of the 1976 conciliation agreement.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

JUN 16 1981

Mr. Arthur G. Hansen
President
Purdue Univerity
Frederick L. Hovde Hall
of Administration
West Lafayette, Indiana 47907

Re: Commissioner Charge No.
960-81-0007

Dear President Hansen:

We appreciate your letter of April 17, 1981, expressing your concerns regarding the above charge, and affording us an opportunity to reply. We apologize for misspelling the name of Purdue University in the Notice of Charge sent to you. As the Notice sent to you stated, Purdue University is named in Appendix A. The name is spelled correctly on Appendix A as it appears attached to the original signed charge.

The omission of Appendix A from the charge as served upon you was occasioned by the requirements of the statute. Section 706(b) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(b), provides that charges shall not be made public by the Commission. This section precludes the Commission from supplying you with a copy of Appendix A because of the necessity of keeping confidential the other names on the Appendix.

Purdue University has not been singled out for special treatment; nor is the Commissioner Charge "superfluous". Purdue University was not the only educational institution named in Appendix A. Its inclusion, as well as the inclusion of the other educational institutions named in Appendix A, was based on the fact that all the hitherto filed charges against Purdue and the other institutions which participate in the Teachers Insurance and Annuity Association (TIAA) and College Retirement Equities Fund (CREF) Annuity Plan, alleged discrimination only as against females. Upon analysis it appears that males who have younger wives and select any form of survivor option for their wives except full survivorship, that is the majority of the males, as compared with similarly-situated females, suffer very heavy losses by reason of the manner in which TIAA-CREF uses sex-segregated tables. It is true that a female who selects a single life annuity suffers a loss as compared with a similarly-situated male who selects a single life annuity. But only a small minority of males select single life annuities.

In contemplating the so-called "transfer" that will result from changing from a sex-segregated to a sex-neutral mortality table, people often overlook the fact that the result is not only larger benefits for single females but also larger benefits for most males who select survivor options for their wives. Under sex-segregated tables, when a male selects any survivor option for his wife, except full survivorship, not only does his wife, after his death, get a much smaller amount than the similarly-situated husband of a female employee, but during his lifetime he suffers a reduction in the amount of his annuity much larger than will be the case under a sex-neutral system.

And, as is often pointed out, under a sex-segregated system males either pay a higher premium or receive lower benefits in life insurance than a similarly-situated female. If sex neutrality is to be applied to annuities, fairness requires it also be applied to life insurance.

The pending suit against Purdue is directed only at correcting retirement benefits for females. It covers neither the discrimination suffered by males who are married and wish their wives to have survivorship benefits nor life insurance where the males suffer such heavy discrimination. As you know, the suit against Purdue was instituted by your female faculty members and the Commission is not a party to the suit. Indeed, the Commission has persuaded counsel for the female faculty members to stay further proceedings while the Commission pursues its Commissioner Charge proceedings, thus, hopefully averting all further legal costs to Purdue of having to litigate this issue in a suit against it only.

The Commission is firmly committed to the policy of treating men and women equally. In working towards a resolution of the TIAA-CREF case we need the proper technical basis for either a consent decree or a litigated decree. This meant adding to each of the existing charges which was limited to females, a companion charge covering males as well and life insurance in addition to annuities. The Commissioner Charge serves this purpose. You will observe that each paragraph of the Commissioner Charge covers males as well as females. The allegations are in terms of an individual of one sex being treated differently from a similarly-situated individual of the other sex.

It is our hope that by having one national charge we can settle the whole matter without the waste of the duplication which would result if there is separate litigation of the case now pending against you, the other pending law suits, and the several dozen other charges against TIAA-CREF and other institutions which have been filed with our various district offices.

To sum up, Purdue was named in the Commissioner Charge because its women faculty members had already sued it on a one-sided charge. Other educational institutions involved in one-sided charges from their female faculty members were also included in the Commissioner Charge. The Commissioner Charge is aimed at achieving fairness to both men and women. It is a necessary procedural step in what we hope will be a prompt, fair, and inexpensive resolution of the TIAA-CREF issues consistent with existing judicial precedent.

Sincerely yours,

J Clay Smith Jr

J. Clay Smith, Jr.
Acting Chairman
Equal Employment Opportunity
Commission

cc: Senator Lugar
Senator Quayle
Senator Hatch
Representative Fithian

AN ANALYSIS OF THE COST OF OFCCP'S COMPLIANCE ACTIVITIES AND ITS IMPACT, AS MEASURED BY NATIONAL EEO-1 FORMS

SECTION I

THE COST OF THE FEDERAL CONTRACT COMPLIANCE PROGRAM

I. Survey of Federal Contractors

To establish an approximation of the annual costs of complying with federal EEO requirements in general and OFCCP's regulations in particular, a survey was taken of 21 companies selected on a representative basis from the Fortune 500 listing. The results of the survey are as follows:

A.	Annual Cost of all EEO Requirements to the Fortune 500		$1.5 billion
B.	Annual Cost of the Contract Compliance Program to the Fortune 500		$942 million
	1. Annual Cost to the Top 50:	$459 mill.	
	2. Annual Cost to the Top 100:	$601 mill.	
	3. Annual Cost to the Top 300:	$773 mill.	
C.	Projected Annual Cost to all 325,000 Federal Contractors. (Since an unknown number of federal contractors are subdivisions of larger corporations, 50,000 contractors were arbitrarily not included to compensate for the possibility of double counting.)		$1.15 billion
	1. Annual Cost to the Top 500 Federal Contractors*	$942 mill.	
	2. Annual Cost to the Top 501-1000 Federal Contractors (assuming an average expenditure of $55,000)*	$27.5 mill.	

3. Annual Cost to the Top 1001-50,000 Federal Contractors (assuming an average expenditure of $2,000)* $98 mill.

4. Annual Cost to the Middle 124,000 (assuming an average expenditure of $500)* $77 mill.

5. Annual Cost to the Bottom 100,000 (assuming an average expenditure of $100)* $10 mill.

D. Average Annual Number of Compliance Reviews for the Fortune 500 - 2.4. This figure would mean that 46% of all the compliance reviews conducted by OFCCP in a given year probably involve Fortune 500 companies. In 1980, one company had 49 of its approximately 100 facilities reviewed.

Average Number for the Top 50	21
Average Number for 51-100	3
Average Number for 101-100	1
Average Number for 301-500	.5

E. Average Cost of a Compliance Review to a Fortune 500 Federal Contractor $20,283.00

* This assumed expenditure would cover such cost as the preparation of all affirmative action plans, the maintenance of necessary employee records, advertising and notice costs caused by regulation, staff time for internal monitoring and responding to agency data requests, work environment alterations to accommodate the handicapped, related legal and consultant fees, and overhead.

II. OFCCP Activities in Fiscal Year 1980 (most recent year for which actual numbers exist)

These figures were based upon OFCCP's FY 1982 budget justification, which stated that in 1981, 80% of its budget was spent on compliance reviews and the remaining 20% on complaint investigations.

[illegible]

A.	Annual Budget	$51 mill.
B.	Number of Employees	1,482 ?
C.	Number of Compliance Actions	4,358
	1. Individual complaint investigations1/	1,736
	2. Number of compliance reviews2/	2,632

[illegible]

1/ An individual complaint investigation simply refers to those investigations initiated by the filing of an individual complaint. They usually are limited to specific employment practices and individual problems, but they may allege class violations. Moreover, OFCCP has the discretion to expand an individual complaint into a broad-based review of the contractor.

2/ Such reviews are initiated by the agency and generally involve an examination of all of the contractor's employment practices.

D. Cost of Compliance Actions

1. Average cost of a complaint investigation $5,875

2. Average cost of a compliance review 15,500

E. Effectiveness of Compliance Actions

1. The agency stated it found actual discrimination in 113 of its compliance reviews or only 4%. It believes that there is a possiblity of discrimination in another 467 or 18%. Thus, in 2,632 compliance reviews initiated by OFCCP in 1980, it found or believes it will find discrimination in 580 or 22%.

2. Total amount be spent by the government on compliance reviews in which there was no finding of discrimination $31.8 mill. ✓

3. Estimated amount spent by federal contractors on these reviews. $41.6 mill. ✓

4. Total amount spent on compliance reviews in which there was no finding of discrimination. $73.4 mill. ✓

5. Percentage of contractors reviewed, assuming each review involved a different contractor. 0.8%

F. Effectiveness of Individual Complaint Investigations

1. Average cost per investigation to OFCCP	$5,875
2. Average Cost of similar investigation by EEOC (based on EEOC's 1982 budget estimates)	$2,000

SECTION II

MINORITY & FEMALE PARTICIPATION RATES IN THE CIVILIAN LABOR FORCE
(1966-1979)

The following 18 charts reflect the national participation rates of minorities and women in the nine categories used by the Equal Employment Opportunity Commission to segment the civilian labor force. The charts are based on data reported by the Commission in its annual summary of all employers filing EEO-1 forms. Any employer with more than 100 employees must annually file such a form, according to Title VII of the 1964 Civil Rights Act. It is estimated that approximately 50,000 employers are involved in this program, each filing an average of 3.3 forms annually. It can be presumed that almost all employers submitting EEO-1 forms are also federal contractors or subcontractors. Data for the years 1968 and 1977 were unavailable.

On each chart, the solid line represents the actual participation rate of minorities or women in that category. The dotted line represents the participation rate of minorities or women in all categories in the civilian labor force and serves as a point of reference. The hyphenated-line indicates the average rate of growth established between 1966 and the year in which the regulations calling for detailed affirmative action plans containing goals and timetables were issued (1971 for minorities and 1972 for women). This section also contained tables listing participation rates by EEO-1 category and year.

The charts demonstrate that despite the great cost of the current OFCCP program, it has had little impact on the previously established participation rates of minorities or women. It should also be noted that the measuring years, 1971 and 1972, reflect the impact in some categories of the general recession suffered by the country during that period.

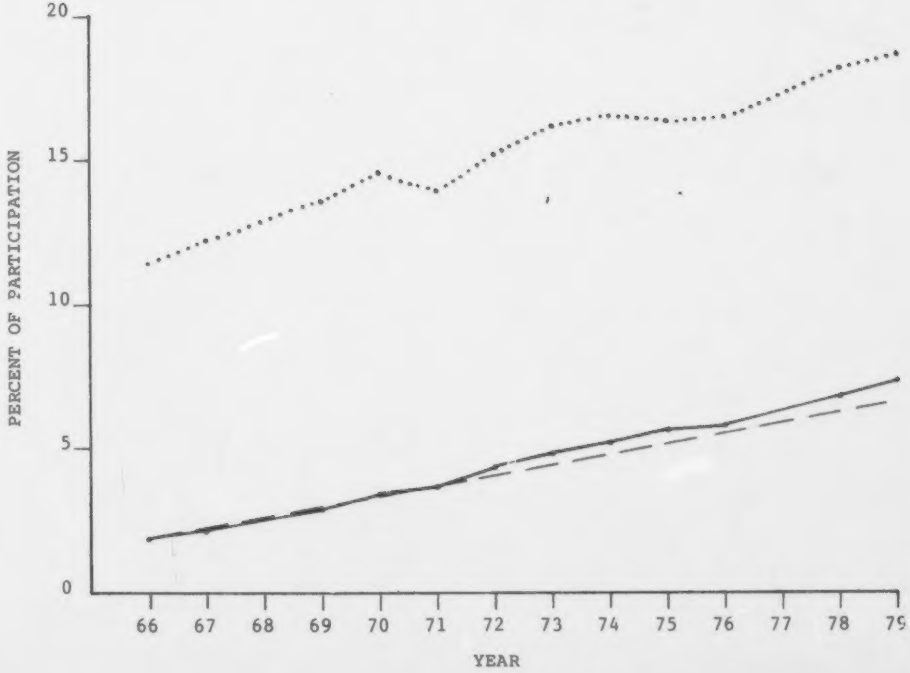
MINORITY PARTICIPATION RATES

EEO-1 Category: Officials and Managers

——— Actual Participation Rate in Category

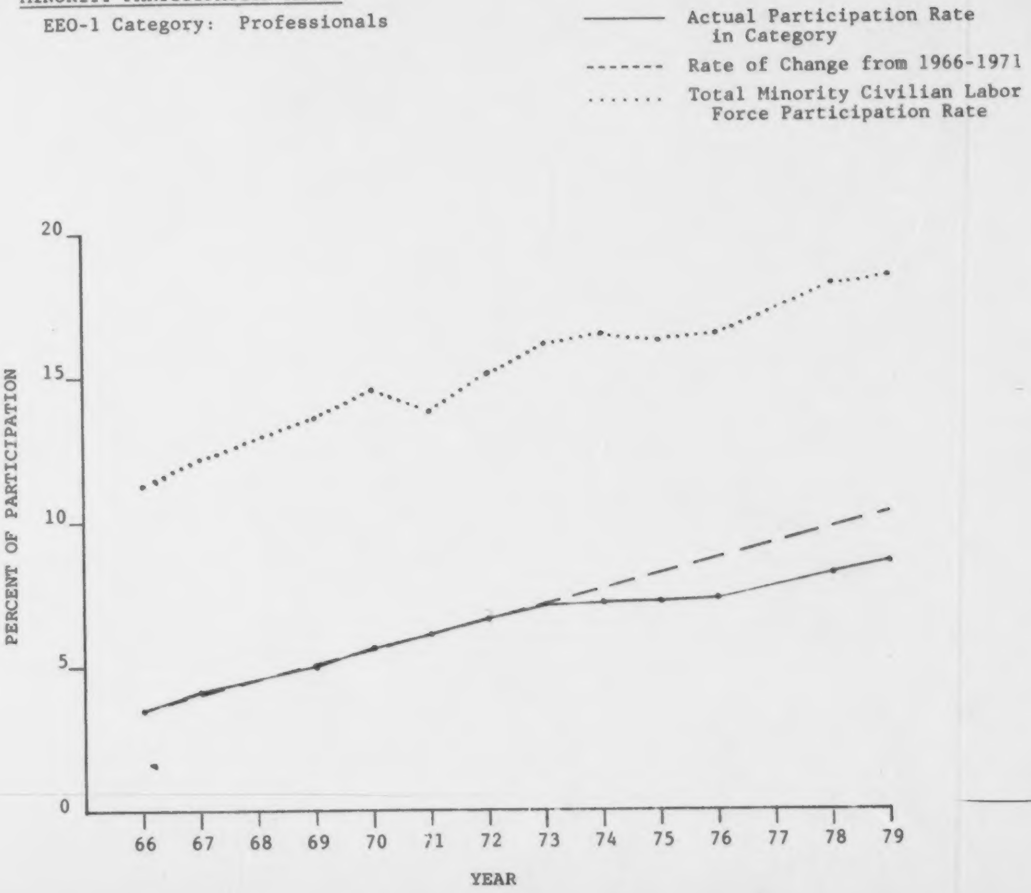
------- Rate of Change from 1966-1971

.... Total Minority Civilian Labor Force Participation Rate



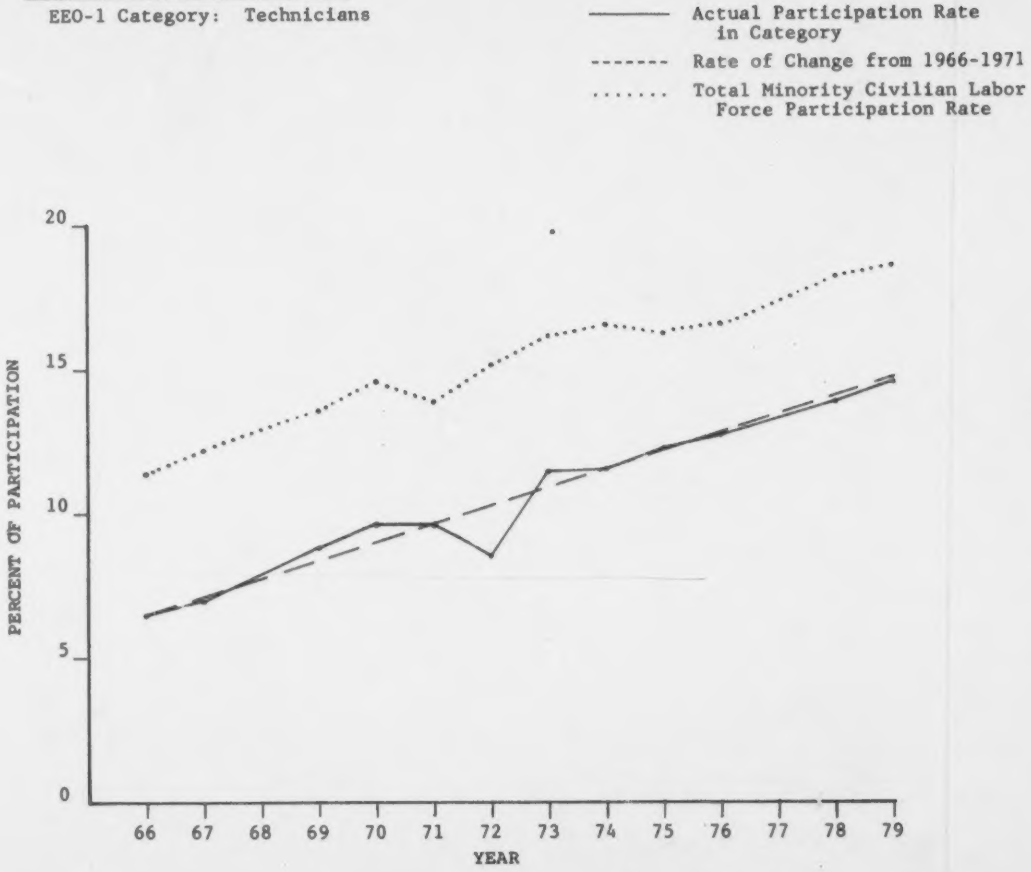
MINORITY PARTICIPATION RATES

EEO-1 Category: Professionals



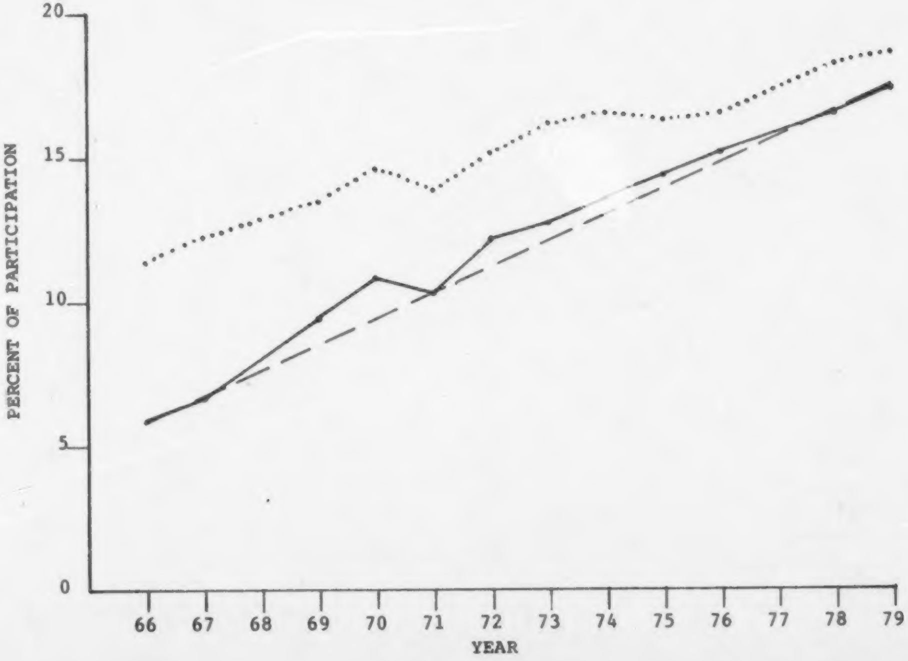
MINORITY PARTICIPATION RATES

EEO-1 Category: Technicians



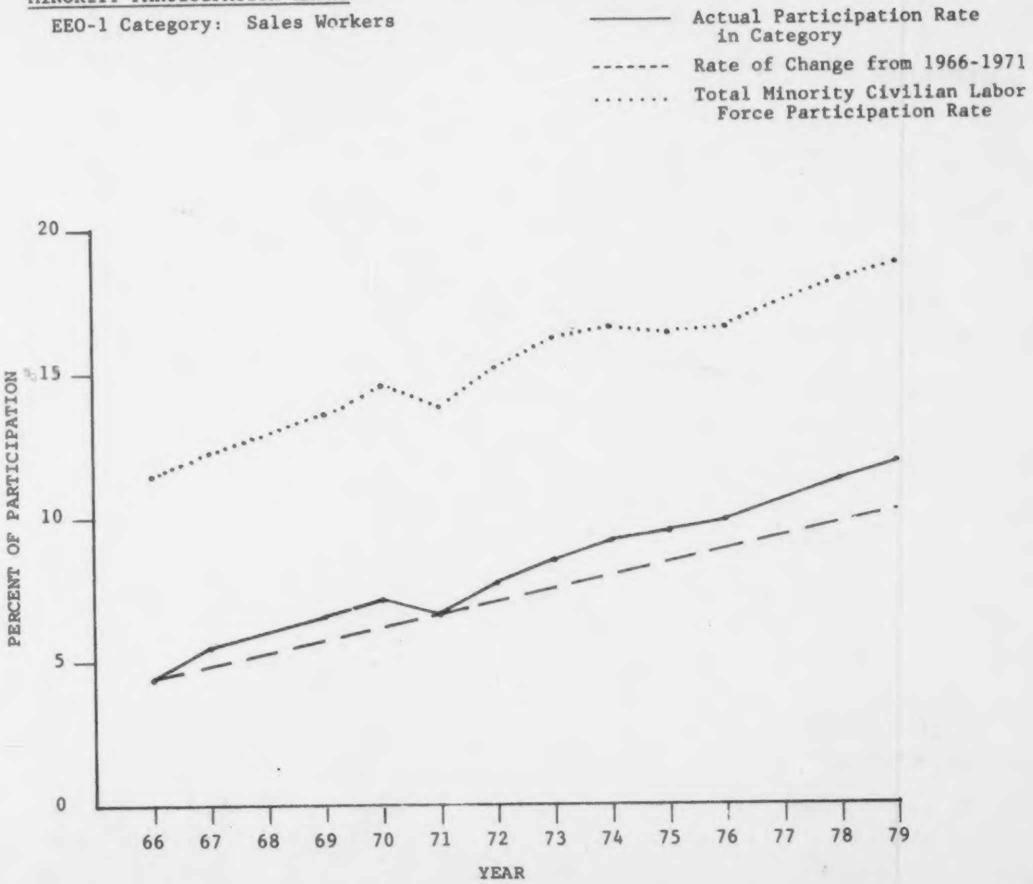
MINORITY PARTICIPATION RATES

EEO-1 Category: Office and Clerical Workers



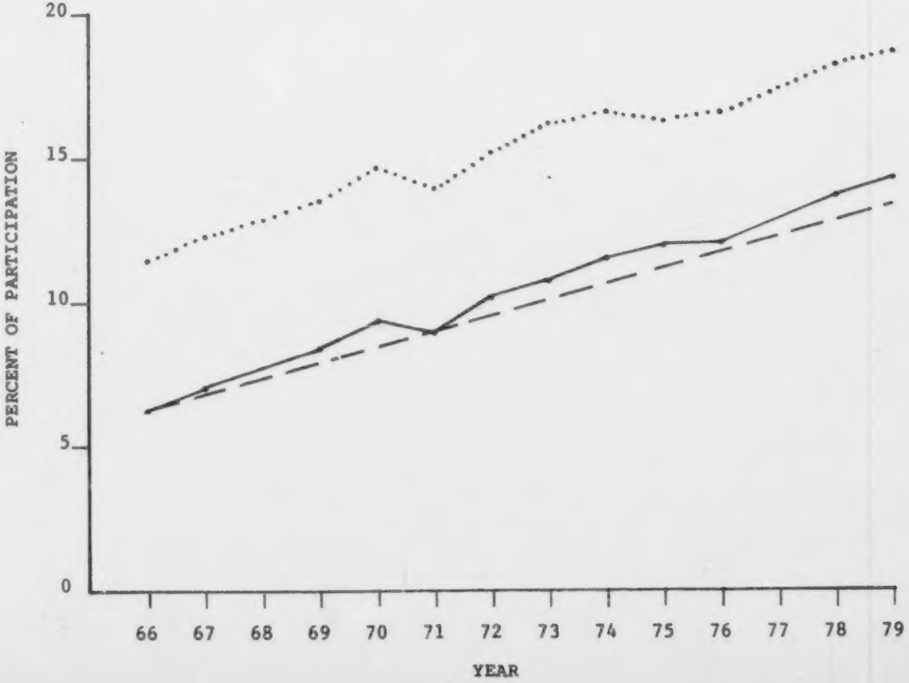
MINORITY PARTICIPATION RATES

EEO-1 Category: Sales Workers



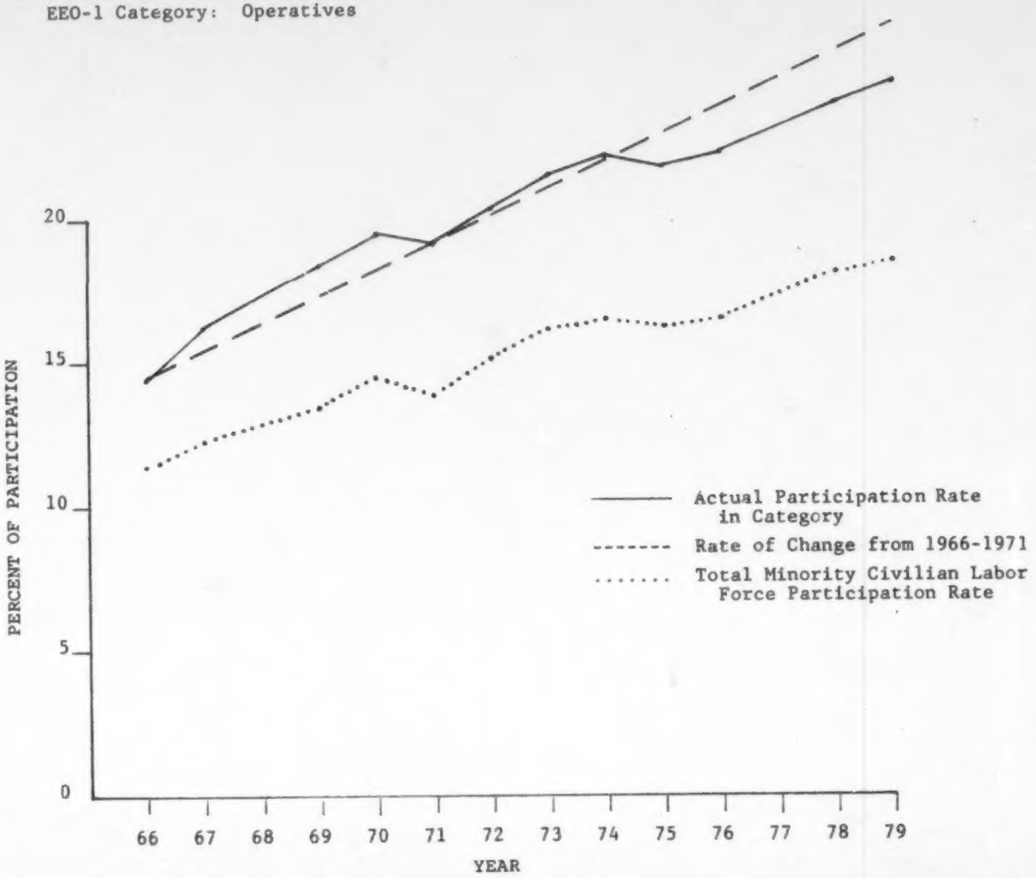
MINORITY PARTICIPATION RATES

EEO-1 Category: Craft Workers



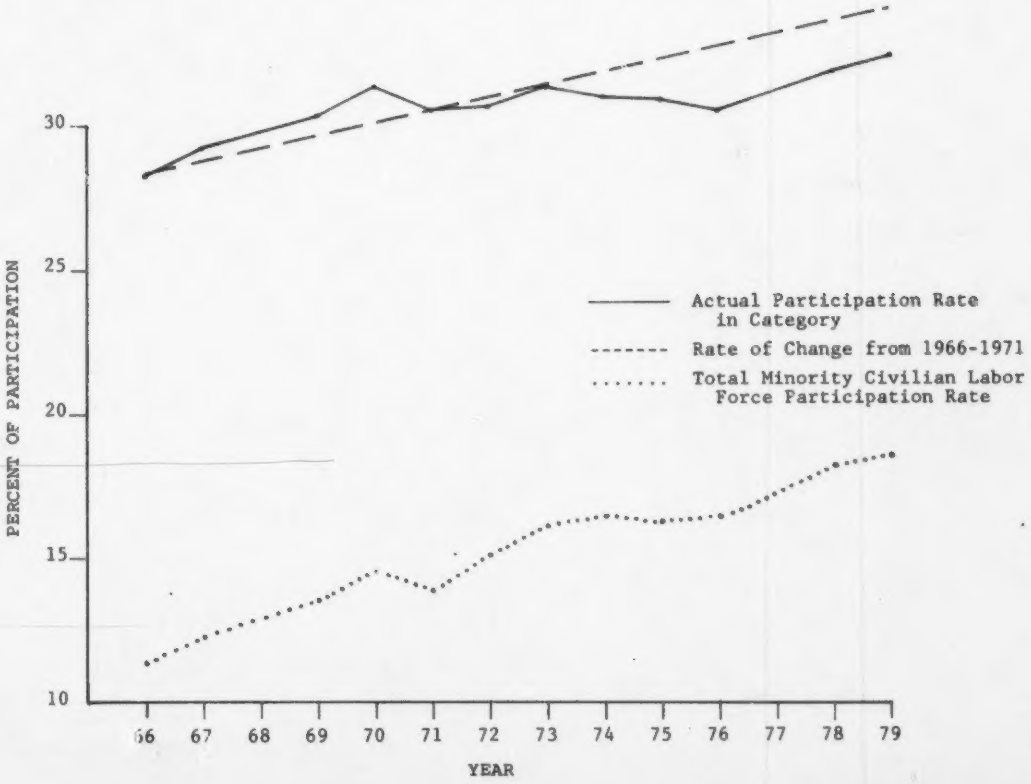
MINORITY PARTICIPATION RATES

EEO-1 Category: Operatives



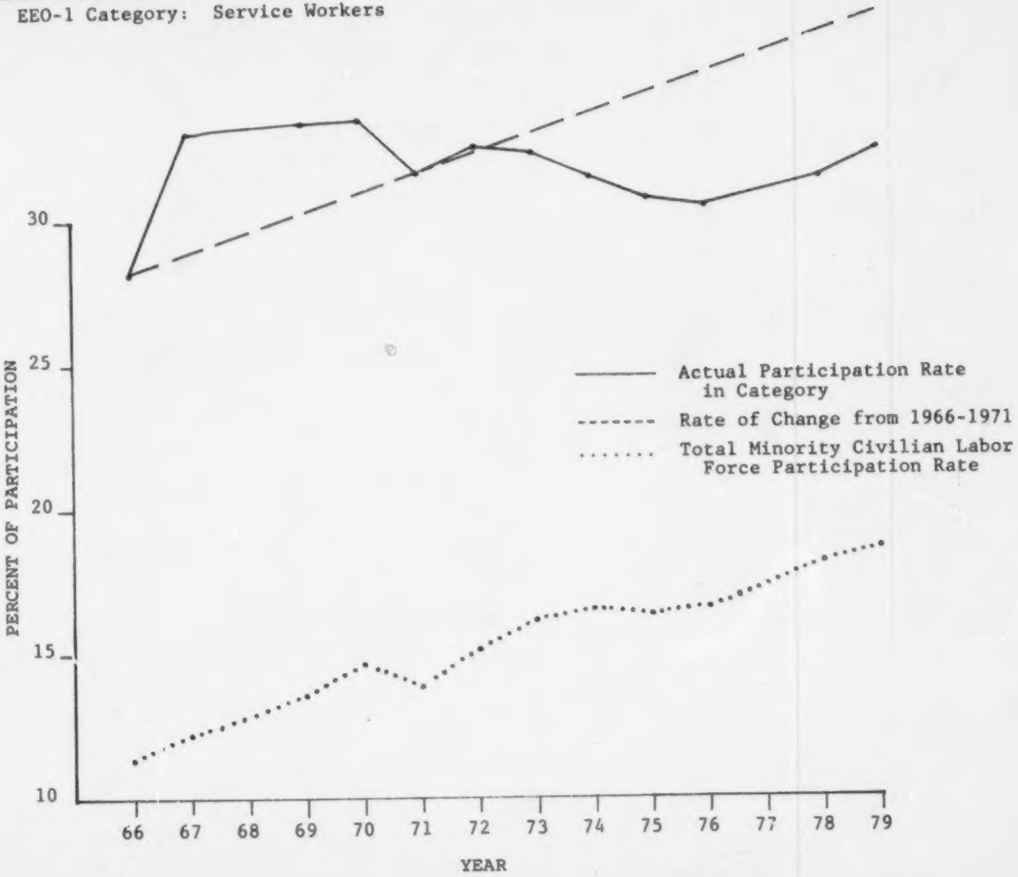
MINORITY PARTICIPATION RATES

EEO-1 Category: Laborers



MINORITY PARTICIPATION RATES

EEO-1 Category: Service Workers



MINORITY PARTICIPATION RATES
BY EEO-1 CATEGORY
(1966-1979)

1. Officials and Managers:

(1966) 1.9	(1971) 3.7	(1976) 5.8
(1967) 2.1	(1972) 4.3	(1977) NA
(1968) NA	(1973) 4.8	(1978) 6.8
(1969) 2.9	(1974) 5.1	(1979) 7.2
(1970) 3.3	(1975) 5.6	

2. Professionals:

(1966) 3.5	(1971) 6.1	(1976) 7.4
(1967) 4.1	(1972) 6.7	(1977) NA
(1968) NA	(1973) 7.1	(1978) 9.2
(1969) 5.0	(1974) 7.2	(1979) 9.6
(1970) 5.7	(1975) 7.2	

3. Technicians:

(1966) 6.5	(1971) 9.6	(1976) 12.8
(1967) 7.0	(1972) 8.6	(1977) NA
(1968) NA	(1973) 11.5	(1978) 13.9
(1969) 8.9	(1974) 11.6	(1979) 14.5
(1970) 9.7	(1975) 12.2	

4. Sales Workers:

(1966) 4.4	(1971) 6.6	(1976) 9.9
(1967) 5.4	(1972) 7.8	(1977) NA
(1968) NA	(1973) 8.5	(1978) 11.2
(1969) 6.6	(1974) 9.1	(1979) 11.9
(1970) 7.1	(1975) 9.4	

5. Office & Clerical Workers:

(1966) 5.9
(1967) 6.7
(1968) NA
(1969) 9.4
(1970) 10.9
(1971) 10.3
(1972) 12.1
(1973) 12.8
(1974) 13.7
(1975) 14.4
(1976) 15.1
(1977) NA
(1978) 16.5
(1979) 17.3

6. Craft Workers:

(1966) 6.2
(1967) 7.0
(1968) NA
(1969) 8.4
(1970) 9.2
(1971) 8.9
(1972) 10.1
(1973) 10.8
(1974) 11.5
(1975) 11.9
(1976) 12.0
(1977) NA
(1978) 13.7
(1979) 14.2

7. Operatives:

(1966) 14.4
(1967) 11.2
(1968) NA
(1969) 18.4
(1970) 19.5
(1971) 19.1
(1972) 20.3
(1973) 21.6
(1974) 22.1
(1975) 21.9
(1976) 22.2
(1977) NA
(1978) 24.0
(1979) 24.6

8. Laborers:

(1966) 28.2
(1967) 29.2
(1968) NA
(1969) 30.4
(1970) 31.3
(1971) 30.6
(1972) 30.8
(19[illegible]) 31.3
(1974) 31.0
(1975) 30.9
(1976) 30.5
(1977) NA
(1978) 31.9
(1979) 32.4

9. Service Workers:

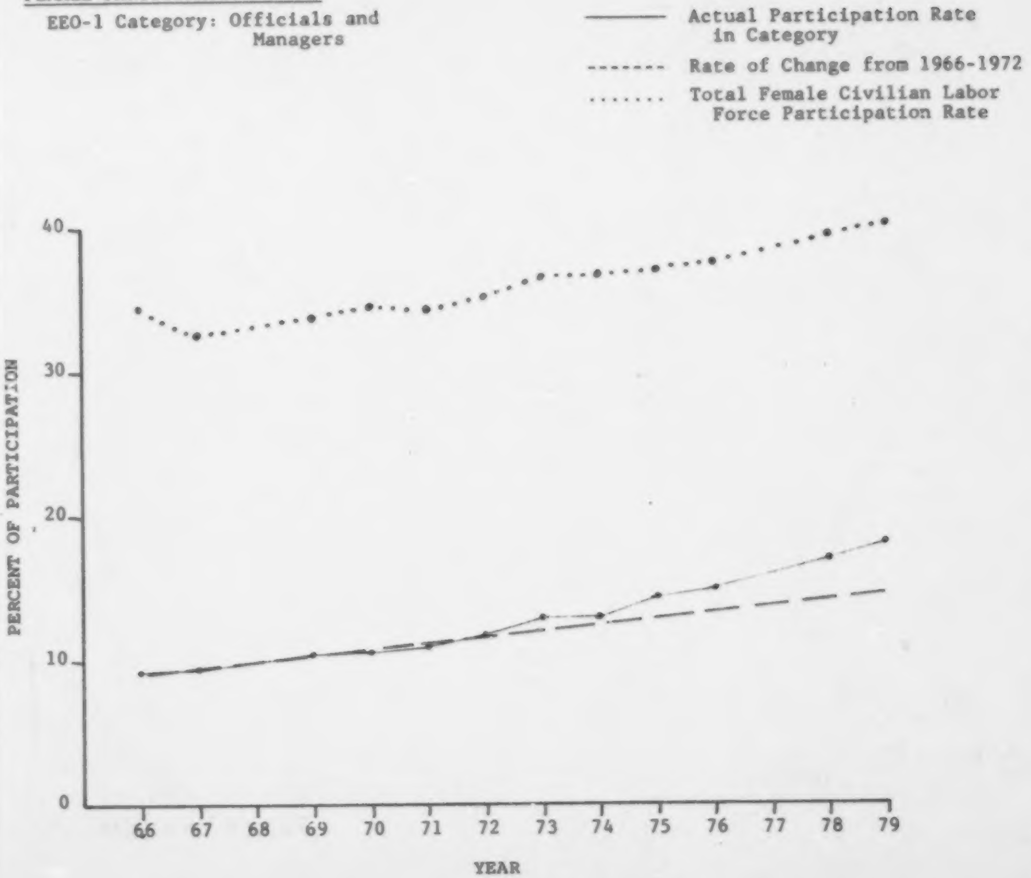
(1966)	28.1	(1971)	31.7	(1976)	30.5
(1967)	33.0	(1972)	32.6	(1977)	NA
(1968)	NA	(1973)	32.3	(1978)	31.5
(1969)	33.4	(1974)	31.5	(1979)	32.4
(1970)	33.5	(1975)	30.8		

10. Civilian Labor Force Participation Rates:

(1966)	11.4	(1971)	13.9	(1976)	16.5
(1967)	12.2	(1972)	15.1	(1977)	NA
(1968)	NA	(1973)	16.1	(1978)	18.1
(1969)	13.6	(1974)	16.5	(1979)	18.6
(1970)	14.7	(1975)	16.2		

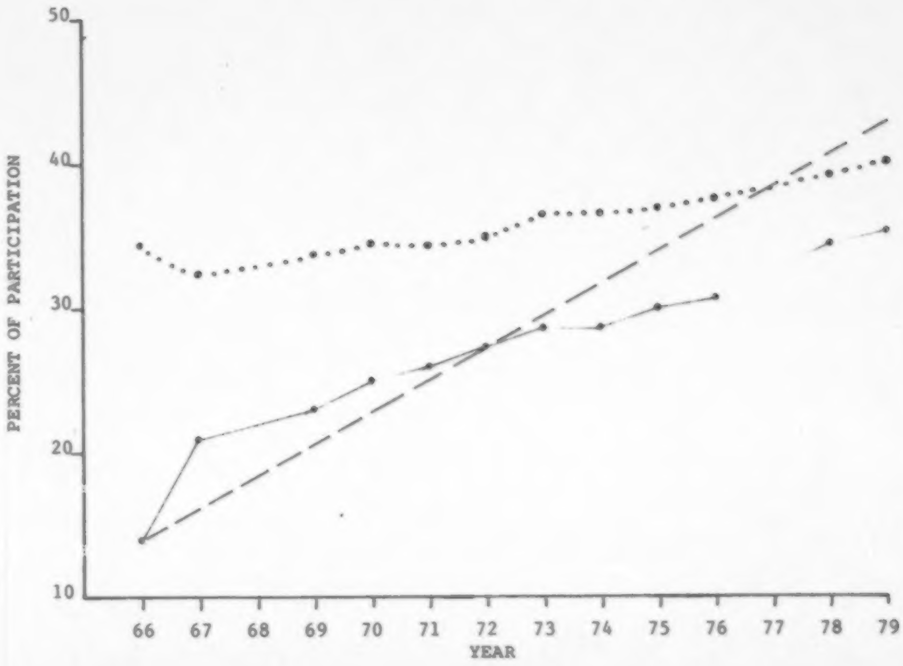
FEMALE PARTICIPATION RATES

EEO-1 Category: Officials and Managers



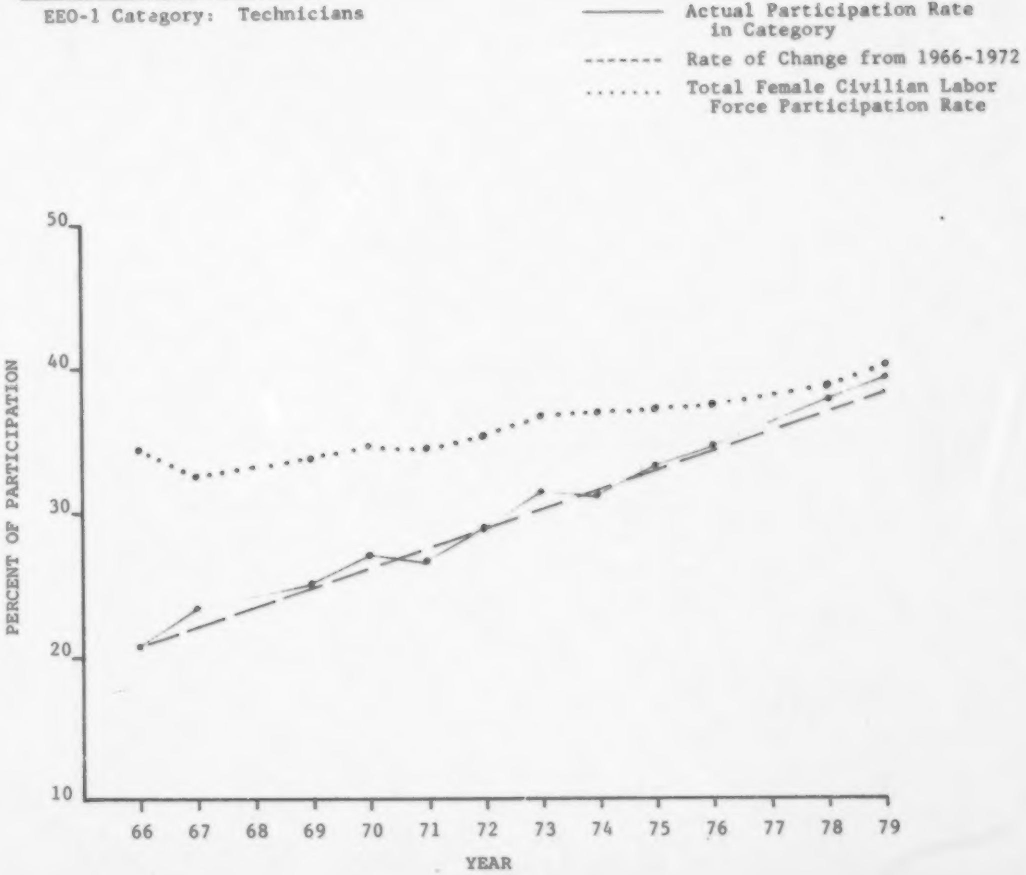
FEMALE PARTICIPATION RATES

EEO-1 Category: Professionals



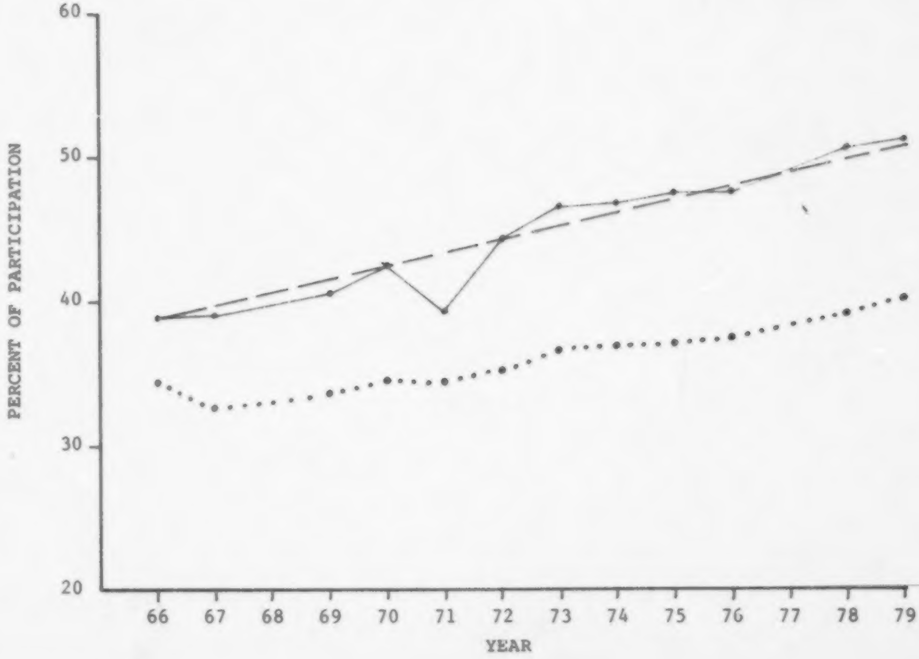
FEMALE PART:CIPATION RATES

EEO-1 Catagory: Technicians



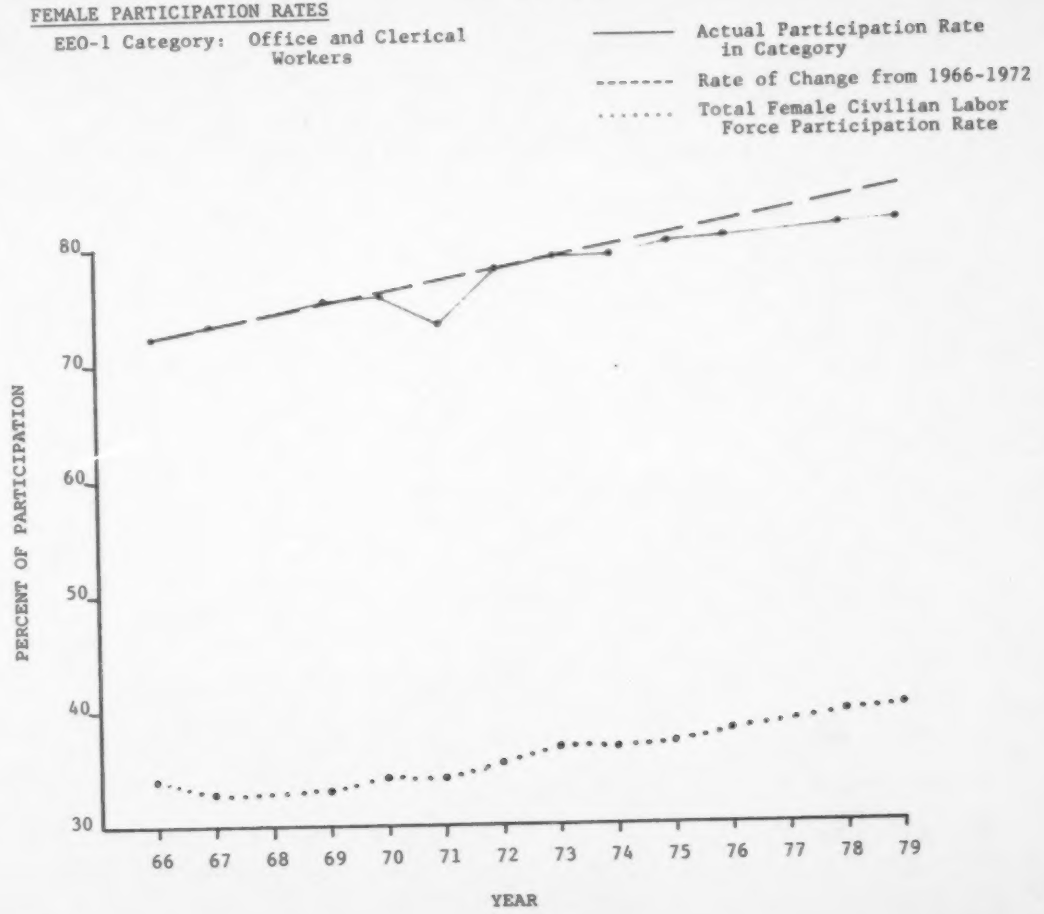
FEMALE PARTICIPATION RATES

EEO-1 Category: Sales Workers



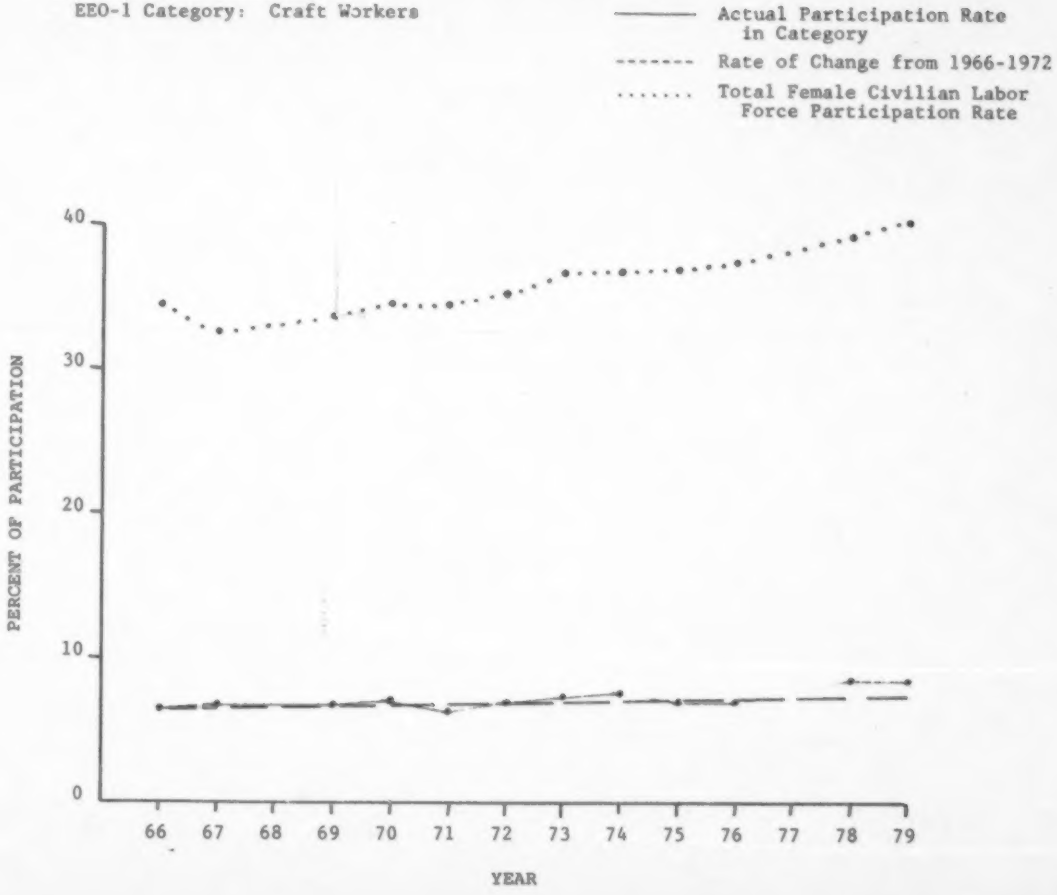
FEMALE PARTICIPATION RATES

EEO-1 Category: Office and Clerical Workers



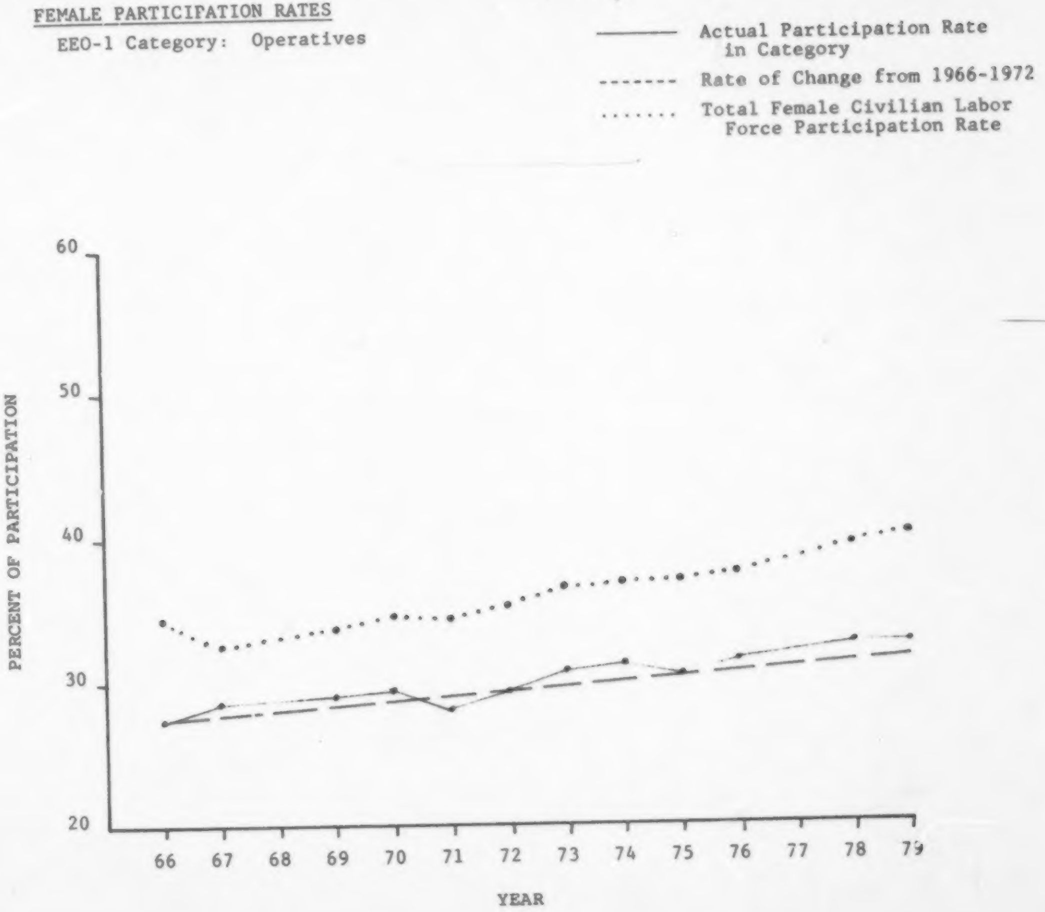
FEMALE PARTICIPATION RATES

EEO-1 Category: Craft Workers



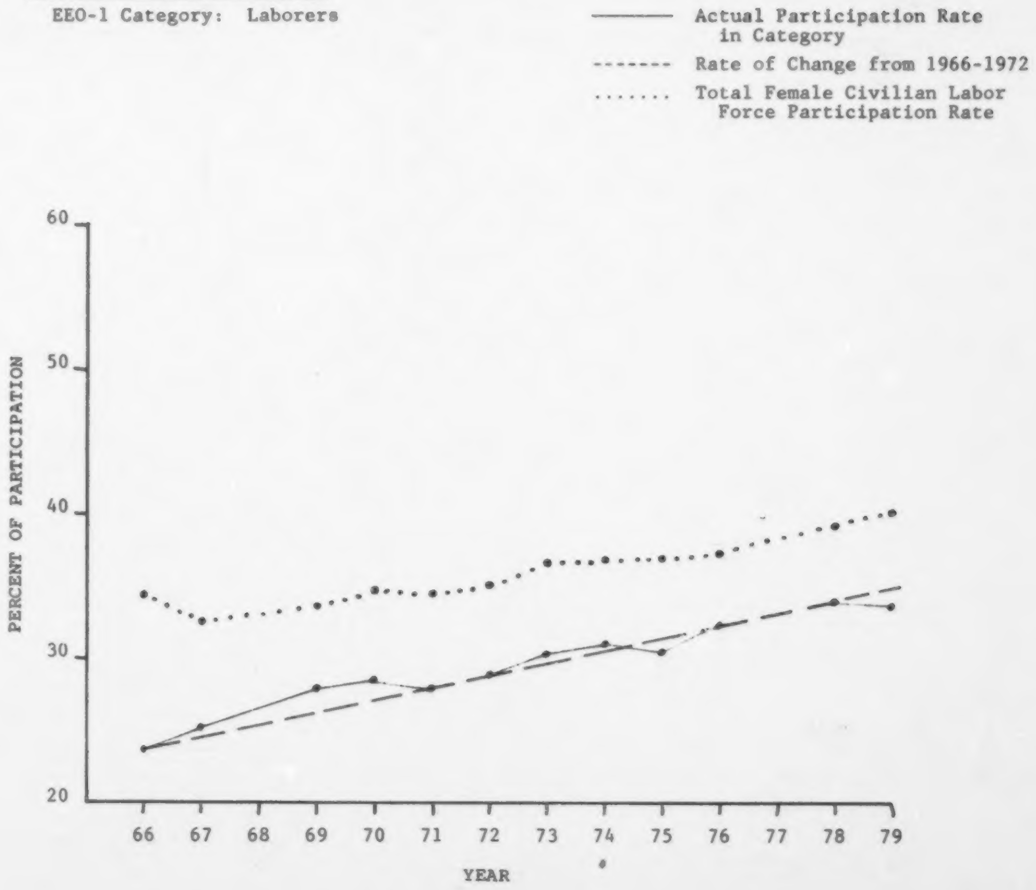
FEMALE PARTICIPATION RATES

EEO-1 Category: Operatives



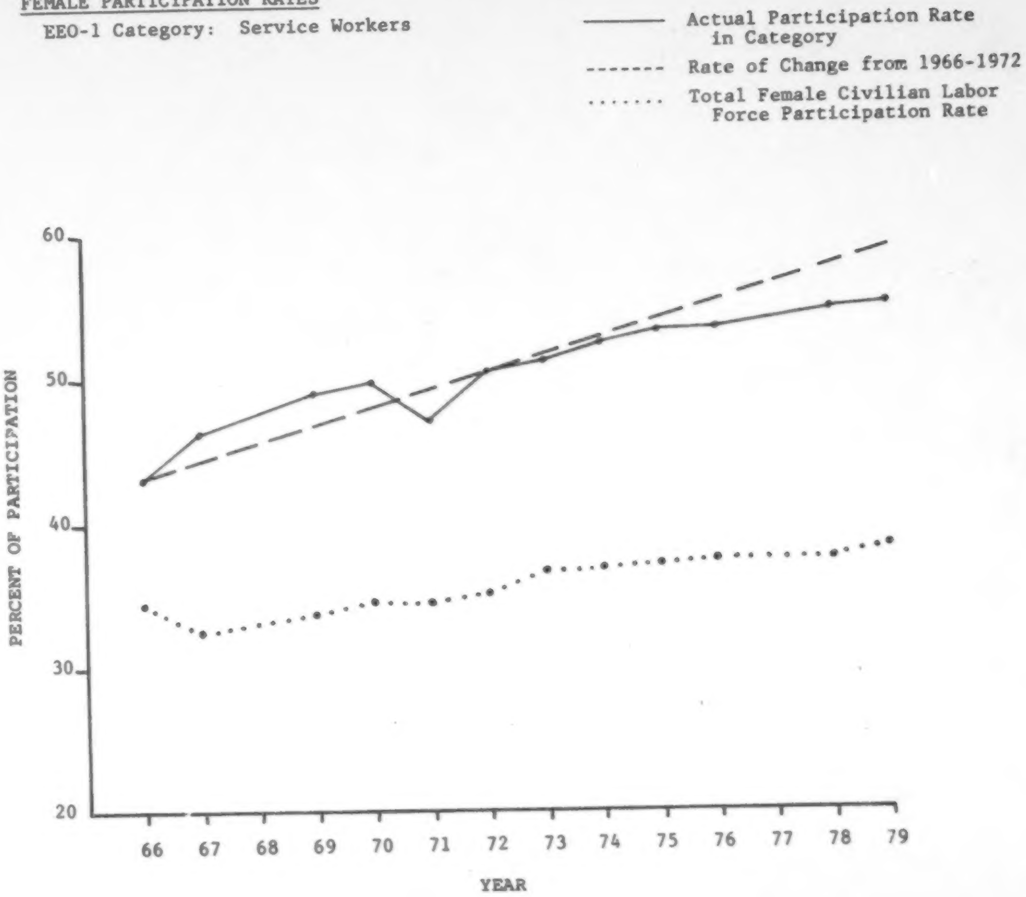
FEMALE PARTICIPATION RATES

EEO-1 Category: Laborers



FEMALE PARTICIPATION RATES

EEO-1 Category: Service Workers



FEMALE PARTICIPATION RATES
BY EEO-1 CATEGORY
(1966-1979)

1. Officials and Managers:

(1966)	9.4	(1971)	10.9	(1976)	14.9
(1967)	9.5	(1972)	11.9	(1977)	NA
(1968)	NA	(1973)	12.9	(1978)	17.0
(1969)	10.2	(1974)	13.1	(1979)	18.1
(1970)	10.3	(1975)	14.3		

2. Professionals:

(1966)	14.0	(1971)	26	(1976)	30.8
(1967)	21.1	(1972)	27.7	(1977)	NA
(1968)	NA	(1973)	28.8	(1978)	34.4
(1969)	23.1	(1974)	28.8	(1979)	35.8
(1970)	25.0	(1975)	30.0		

3. Technicians:

(1966)	20.7	(1971)	26.3	(1976)	34.3
(1967)	23.8	(1972)	28.9	(1977)	NA
(1968)	NA	(1973)	31.7	(1978)	37.9
(1969)	25	(1974)	31.2	(1979)	39.3
(1970)	27	(1975)	33.3		

4. Sales Workers:

(1965)	38.8	(1971)	39.7	(1976)	47.8
(1967)	38.9	(1972)	44.2	(1977)	NA
(1968)	NA	(1973)	46.5	(1978)	50.4
(1969)	40.5	(1974)	46.6	(1979)	51.6
(1970)	42.5	(1975)	47.8		

5. Office & Clerical Workers:

(1966)	72.4	(1971)	73.8	(1976)	81.0
(1967)	73.7	(1972)	78.2	(1977)	NA
(1968)	NA	(1973)	79.2	(1978)	82.0
(1969)	75.5	(1974)	79.3	(1979)	82.4
(1970)	76.3	(1975)	80.2		

6. Craft Workers:

(1966)	6.3	(1971)	6.1	(1976)	7.1
(1967)	6.8	(1972)	7	(1977)	NA
(1968)	NA	(1973)	7.5	(1978)	8.6
(1969)	6.8	(1974)	7.7	(1979)	8.5
(1970)	6.9	(1975)	7.1		

7. Operatives:

(1966)	27.7	(1971)	28	(1976)	31.7
(1967)	28.6	(1972)	29.6	(1977)	NA
(1968)	NA	(1973)	30.7	(1978)	32.4
(1969)	29	(1974)	31.4	(1979)	32.4
(1970)	29.7	(1975)	30.3		

8. Laborers:

(1966)	23.9	(1971)	28	(1976)	32.2
(1967)	25.6	(1972)	29	(1977)	NA
(1968)	NA	(1973)	30.2	(1978)	34.0
(1969)	28	(1974)	31.3	(1979)	33.9
(1970)	28.5	(1975)	30.7		

9. Service Workers:

(1966) 43.3	(1971) 47.4	(1976) 53.7
(1967) 46.1	(1972) 50.2	(1977) NA
(1968) NA	(1973) 51.5	(1978) 54.7
(1969) 48.9	(1974) 52.2	(1979) 55.1
(1970) 49.9	(1975) 53.4	

10. Civilian Labor Force Participation Rate:

(1966) 34.2	(1971) 34.2	(1976) 37.8
(1967) 32.6	(1972) 35.4	(1977) NA
(1968) NA	(1973) 36.5	(1978) 39.6
(1969) 33.9	(1974) 36.7	(1979) 40.1
(1970) 34.5	(1975) 37.1	

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202 789-8600

October 21, 1981

MEMORANDUM

Re: Case Law regarding Denial of Hearing Rights prior to Termination of Contract Award

The following courts have held that the OFCCP may not take any action which would prevent contractors from continuing to be eligible for federal contracts prior to a hearing on the merits at which the contractor is found guilty of non-compliance with Executive Order 11246: Illinois Tool Works, Inc. v. Marshall, 601 F.2d 943 (7th Cir. 1979); Sundstrand Corp. v. Marshall, 20 FEP Cases 352 (N.D. Ill. 1978); Pan American World Airways, Inc. v. Marshall, 439 F. Supp. 487 (S.D. N.Y. 1977); Texaco v. Marshall, No. B-7-416-CA (E.D. Tex. 1977); International Harvester Co. v. Marshall, No. IP-77-159-C (S.D. Ind. 1977); and Conrac Corp. v. Marshall, No. 77-3153 (C.D. Cal. 1977).

Cases involving other applications of the government procurement statutes have also recognized that an opportunity for a hearing is generally required before a contractor may be debarred. See, e.g., Transco Security, Inc. v. Freeman, 639 F.2d 318 (6th Cir. 1981)(U.S. appeal pending); Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (2d Cir. 1975); Air Terminal Services, Inc. v. Department of Transportation, 400 F. Supp. 1029 (D.D.C. 1973), aff'd per curiam, 515 F.2d 1014 (D.C. Cir. 1975); Horne Brothers, Inc. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972); Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964); Art-Metal--USA, Inc. v. Solomon, 473 F. Supp. 1 (D.D.C. 1978).

(Note: In the interest of economy, the following reports submitted to the committee in conjunction with these hearings were retained in the files of the committee where they may be researched upon request:

GAO report to the Chairman of the Committee on Labor and Human Resources entitled "Labor Needs to Better Select, Monitor, and Evaluate Its Employment and Training Awardees," August 28, 1981;

GAO report to the Chairman of the Committee on Labor and Human Resources entitled "Information on Funding Commitments From Comprehensive Employment and Training Act Titles III and IV During Fiscal Year 1981," August 31, 1981; and

A report by Seyfarth, Shaw, Fairweather & Geraldson, 1111 19th Street, N.W., Washington, D.C. 20036, entitled "Issues Raised by Executive Order No. 11,246," June 9, 1981.)

Senator **Williams**. We will now stand in recess.

[Whereupon, at 11:45 a.m., the committee recessed, to reconvene at the call of the Chair.]

○